March 27/87

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~352.~~ 143

THE CITY OF KENOSHA, PLAINTIFF IN ERROR,

vs.

JOSHUA F. LAMSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

FILED DECEMBER 11, 1886.

SUPREME COURT OF THE UNITED STATES.

No. 353.

THE CITY OF KENOSHA, PLAINTIFF IN ERROR,

vs.

JOSHUA F. LAMSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

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1 Circuit Court of the United States of America for the district of Wisconsin.

UNITED STATES OF AMERICA, *District of Wisconsin, ss*:

At a stated term of the Circuit Court of the United States of America for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, on the second Monday (being the thirteenth day) of April, A. D. 1868. Present: The Honorable Andrew G. Miller, district judge, presiding; Cassius Fairchild, marshal; Edward Kurtz, clerk.

Among other the following proceedings were had, to wit:

JOSHUA F. LAMSON, plaintiff,
vs.
THE CITY OF KENOSHA, defendant. } 213 Law Docket B. At law.

Be it remembered that heretofore, to wit, on the sixth day of September, A. D. 1867, came the above-named plaintiff, by his attorney, Mr. Carpenter, and filed his præcipe for a summons against the above-named defendant, as follows, to wit:

Circuit Court of the United States of America for the district of Wisconsin.

Præcipe for summons.

JOSHUA F. LAMSON
vs.
THE CITY OF KENOSHA.

2 Issue a summons in the above-entitled cause of a plea of debt to the plaintiff's damage ten thousand dollars, returnable the second Monday of September, 1867.

Dated Sept. 6, 1867.

M. H. CARPENTER,
Plaintiff's Attorney.

To Edward Kurtz, esq., clerk.

And on the same day filed a bond for costs, as required by the rules of court, as follows, to wit:

3 Know all men by these presents, that we, Joshua F. Lamson, by Matt. H. Carpenter, his attorney, as principal, and Matt. H. Carpenter, of the city of Milwaukee, State of Wisconsin, as surety, are held and firmly bound unto the City of Kenosha in the sum of two hundred dollars, to be paid to the said city of Kenosha, executors, administrators or assigns; to which payment well and truly to be made and done we do bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals the sixth day of September, A. D. 1867.

Whereas an action of debt is about to be commenced at the suit of Joshua F. Lamson, plaintiff, against the city of Kenosha, defendant: Now therefore the condition of this obligation is such, that if the

plaintiff will pay all costs that may be awarded against him, not exceeding the aforesaid sum, then this obligation to be void, else valid.

JOSHUA F. LAMSON,
[SEAL.] "By MAT. H. CARPENTER,
His Att'y.
[SEAL.] "MAT. H. CARPENTER.

Witness—
GEO. COGSWELL.

DISTRICT OF WISCONSIN, *ss:*

Matt. H. Carpenter, being sworn, says that he is worth the sum of five hundred dollars, exclusive of property exempt from execution and his debts.

MAT. H. CARPENTER.

Subscribed and sworn to before me the 6th day of September, A. D. 1867.

GEO. COGSWELL,
Notary Public in and for the State of Wisconsin, Mil. Co.

Endorsed as follows: This bond approved and filed September 6th, 1867. Edward Kurtz, clerk.

4 Whereupon a summons issued, as follows, to wit:

THE UNITED STATES OF AMERICA, *ss:*

5 The President of the United States of America to the marshal of the district of Wisconsin, greeting:

You are hereby commanded to summon the city of Kenosha to appear before the Circuit Court of the United States of America for the district of Wisconsin, in the seventh circuit, at the United States court-room in the city of Milwaukee, on the second Monday of September ensuing, then and there to answer unto Joshua F. Lamson, in a plea of debt to his damage ten thousand dollars, which shall then and there be made to appear. And of this writ make due return.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said district, this sixth day of September, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the United States the ninety-second.

[SEAL.] EDWARD KURTZ, *Clerk.*
M. H. CARPENTER, *Attorney.*

6 *Return to summons.*

Summons returned: "Served on the within-named, the city of Kenosha, by showing this summons to Milton H. Pettit, mayor, and

Cyrus B. Lewis, clerk of the city of Kenosha, and delivering to each a true and attested copy thereof, this 7th day of September, 1867.

"Fees, $6 60.

"CASSIUS FAIRCHILD, *Marshal*,
"By WALLACE MYGATT, *Deputy*."

SEPTEMBER 11, 1867.

This day came the plaintiff, by his counsel, and filed his declaration, and on his motion it is ordered by the court that the defendant plead thereto by the first Monday of October next, or its default will be entered.

OCTOBER 9, 1867.

This day came the defendant by its attorneys, Messrs. John W. & A. L. Cary, and filed its plea and affidavit of defence.

And said affidavit is as follows, to wit:

Circuit Court of the United States for the district of Wisconsin.

Affidavit of defence.

THE CITY OF KENOSHA
ags.
JOSHUA F. LAMSON. } Second suit.

STATE OF WISCONSIN, *County of Kenosha*, ss:

G. T. Van Arsdale, being duly sworn, deposes and says, that the defendant in the above-entitled suit is a municipal corporation; that he is a member of the common council of said defendant, and as such has charge of the defence of this suit; that he verily believes said defendant has a good and substantial defence to the whole of the plaintiff's demand in this suit.

G. T. VAN ARSDALE.

Sworn to before me this 8th day of October, 1867.

L. B. NICHOLS,
Clerk Kenosha County Circuit Court.

OCTOBER 22, 1867.

This day came the plaintiff, by his attorney, and filed stipulation of deft's att'ys, as follows, to wit:

Circuit Court of the United States for the district of Wisconsin.

Stipulation for amendments.

JOSHUA F. LAMSON
v.
THE CITY OF KENOSHA. } Præcipe, Sept. 6, 1867.

In this cause we stipulate that the præcipe, writ and declaration may be amended by the plaintiff, as he shall be advised, and by filing

a written statement of the amendments desired, they shall be deemed as made; amended declaration to be served on us.

Dated October 21, 1867.

J. W. & A. L. CARY,
Deft's Att'ys.

And same day, (October 22, 1867,) plaintiff, by his attorney, filed statement of amendments, as follows, to wit:

8 Circuit Court of the United States for the district of Wisconsin.

Amendments to writ, &c.

JOSHUA F. LAMSON
v.
THE CITY OF KENOSHA. } Præcipe, Sept. 6, 1867.

Here in court comes the plaintiff, and on filing stipulation of defendant this day, dated October 21, 1867, makes the following amendments of præcipe and writ, that is to say:

(1.) Change the præcipe so as to read "in a plea of trespass on the case on premises" to the plaintiff's damage "one hundred thousand dollars."

(2.) Change the writ to a "plea of trespass on the case on promises," and change the ad damnum to "one hundred thousand dollars."

(3.) The plaintiff also this day files an amended declaration in assumpsit.

MATT. H. CARPENTER,
Attorney for Plaintiff.

Endorsed as follows: Copy of within served on us this 22d day of October, A. D. 1867. John W. & A. L. Cary, att'ys for def't.

And same day, (October 22, 1867,) amended declaration filed, as follows, to wit:

9 Circuit Court of the United States for the district of Wisconsin, of the September term, A. D. 1867.

Declaration.

DISTRICT OF WISCONSIN, *ss*:

Joshua F. Lamson, who is a citizen of the State of Massachusetts, by Matt. H. Carpenter, his attorney, complains of the city of Kenosha, which is a municipal corporation created by and existing under the laws of the State of Wisconsin, in the State of Wisconsin, of a plea of trespass on the case upon premises, for that whereas, the said defendant, on the 4th day of September, in the year one thousand

eight hundred and sixty-seven, at the city of Milwaukee, in said district, was indebted to the said plaintiff in the sum of one hundred thousand dollars, lawful money of the United States of America, for the work and labor, care and diligence of the said plaintiff by the said plaintiff before that time done, performed and bestowed, in and about the business of the said defendant, and for the said defendant, and at the special instance and request of the said defendant, and also for divers materials and other necessary things by the said plaintiff found, provided, used and applied in and about that work at the special instance and request of the said defendant, and being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned, when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendant, done, performed and bestowed divers other work and labor, care and diligence, in and about the business of the said defendant, and for the said defendant, and had before that time found, provided, used and applied divers other materials and other necessary things, in and about that business, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay the said plaintiff so much money as the said plaintiff reasonably deserved to have of the said defendant for the same, when the said defendant should be thereunto afterwards requested, and the said plaintiff avers that the said plaintiff therefore reasonably deserves to have of the said defendant for the same the further sum of one hundred thousand dollars, of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, had notice. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, was indebted to the said plaintiff in the sum of one hundred thousand dollars of like lawful money as aforesaid, for divers goods, wares and merchandise, by the said plaintiff before that time sold and delivered to the said defendant, and at the like request of the said defendant. And in the further sum of one hundred thousand dollars of lawful money as aforesaid, for so much money before that time lent and advanced by the said plaintiff to the said defendant, and at the like request of the said defendant. And for other money by the said plaintiff before that time paid, laid out and expended for the said defendant, and at the request of the said defendant. And for other money by the said defendant before that time had and received to and for the use of the said plaintiff. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said several sums of

money in this count mentioned, when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there found to be in arrear and indebted to the said plaintiff in the further sum of one hundred thousand dollars of like lawful money as aforesaid. And being so found in arrear and indebted to the said plaintiff the said defendant, in consideration thereof, afterwards, to wit, on the same day, year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant, although often requested, &c., has not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiff of one hundred thousand dollars, and therefore the said plaintiff brings suit, &c.

MAT. H. CARPENTER,
Plaintiff's Attorney.

10 *Notice.*

The defendant will please take notice, that on the trial of this action the plaintiff will introduce and give in evidence, under the money counts of this declaration, the following described coupons, which were attached to bonds issued by the said defendant in aid of the Kenosha and Rockford Railroad Company, said bonds dated September 1st, A. D. 1867, viz:

43 coupons maturing March 1, 1862.
43 coupons maturing September 1, 1862.
43 coupons maturing March 1, 1863.
43 coupons maturing September 1, 1863.
43 coupons maturing March 1, 1864.
43 coupons maturing September 1, 1864.
43 coupons maturing March 1, 1865.
43 coupons maturing September 1, 1865.
43 coupons maturing March 1, 1866.
43 coupons maturing September 1, 1866.
43 coupons maturing March 1, 1867.
43 coupons maturing September 1, 1867.

On the following of said bonds, viz., one of said coupons maturing at each of said dates above, on the following numbered of said bonds, viz: 97, 166, 132, 75, 131, 76, 129, 167, 130, 185, 91, 186, 48, 181, 39, 40, 41, 25, 2, 1, 29, 180, 26, 38, 24, 85, 28, 32, 126, 86, 176, 30, 127, 27, 174, 177, 179, 81, 99, 98, 178, 82, 33.

11 That a copy of one of said coupons is as follows, viz:

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1865, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered 166.

Dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

That a copy of one of said bonds is hereto attached, except the number thereof, and marked exhibt No. 1.

12 *Exhibit No.* 1.

STATE OF WISCONSIN, UNITED STATES OF AMERICA,

$500 *Bond of the city of Kenosha.—No.* 30. Loan $100,000.

Issued according to law to the Kenosha and Rockford Railroad Company, to aid in the construction of their railroad.

The city of Kenosha, Wisconsin, hereby acknowledges itself justly indebted to Josiah Bond, or bearer, and for value received promises to pay to him, or bearer, twenty years from the date hereof, at the People's Bank, in the city of New York, the sum of five hundred dollars, with interest at the rate of ten per cent. per annum, payable semi-annually, upon presentation of the proper coupons at the said People's Bank for the said interest. For the just and true payment of the said sum of five hundred dollars, and the interest thereon, as herein set forth, to the said Josiah Bond, or bearer, the faith of the said city of Kenosha is hereby irrevocably pledged.

This bond is hereby certified to be issued in pursuance of an act of the legislature of the State of Wisconsin, passed at a session thereof in the year 1857, approved March 2, 1857, giving the city of Kenosha authority to loan its credit for the purposes therein specified, and also in pursuance of a vote of the freeholders of the city of Kenosha, taken for that purpose, after due notice given, authorizing a loan of $100,000 in aid of the Kenosha and Rockford Railroad Company.

In witness whereof I, the mayor of Kenosha, have hereto subscribed my name and affixed the seal of the said city of Kenosha, at the city of Kenosha, Wisconsin, this first day of September, A. D. 1857.

[SEAL.]

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1877, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

money in this count mentioned, when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there found to be in arrear and indebted to the said plaintiff in the further sum of one hundred thousand dollars of like lawful money as aforesaid. And being so found in arrear and indebted to the said plaintiff the said defendant, in consideration thereof, afterwards, to wit, on the same day, year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant, although often requested, &c., has not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiff of one hundred thousand dollars, and therefore the said plaintiff brings suit, &c.

MAT. H. CARPENTER,
Plaintiff's Attorney.

10 *Notice.*

The defendant will please take notice, that on the trial of this action the plaintiff will introduce and give in evidence, under the money counts of this declaration, the following described coupons, which were attached to bonds issued by the said defendant in aid of the Kenosha and Rockford Railroad Company, said bonds dated September 1st, A. D. 1867, viz:

43 coupons maturing March 1, 1862.
43 coupons maturing September 1, 1862.
43 coupons maturing March 1, 1863.
43 coupons maturing September 1, 1863.
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43 coupons maturing March 1, 1867.
43 coupons maturing September 1, 1867.

On the following of said bonds, viz., one of said coupons maturing at each of said dates above, on the following numbered of said bonds, viz: 97, 166, 132, 75, 131, 76, 129, 167, 130, 185, 91, 186, 48, 181, 39, 40, 41, 25, 2, 1, 29, 180, 26, 38, 24, 85, 28, 32, 126, 86, 176, 30, 127, 27, 174, 177, 179, 81, 99, 98, 178, 82, 33.

11 That a copy of one of said coupons is as follows, viz:

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1865, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered 166.

Dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

That a copy of one of said bonds is hereto attached, except the number thereof, and marked exhibt No. 1.

12 *Exhibit No.* 1.

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$500 *Bond of the city of Kenosha.—No.* 30. Loan $100,000.

Issued according to law to the Kenosha and Rockford Railroad Company, to aid in the construction of their railroad.

The city of Kenosha, Wisconsin, hereby acknowledges itself justly indebted to Josiah Bond, or bearer, and for value received promises to pay to him, or bearer, twenty years from the date hereof, at the People's Bank, in the city of New York, the sum of five hundred dollars, with interest at the rate of ten per cent. per annum, payable semi-annually, upon presentation of the proper coupons at the said People's Bank for the said interest. For the just and true payment of the said sum of five hundred dollars, and the interest thereon, as herein set forth, to the said Josiah Bond, or bearer, the faith of the said city of Kenosha is hereby irrevocably pledged.

This bond is hereby certified to be issued in pursuance of an act of the legislature of the State of Wisconsin, passed at a session thereof in the year 1857, approved March 2, 1857, giving the city of Kenosha authority to loan its credit for the purposes therein specified, and also in pursuance of a vote of the freeholders of the city of Kenosha, taken for that purpose, after due notice given, authorizing a loan of $100,000 in aid of the Kenosha and Rockford Railroad Company.

In witness whereof I, the mayor of Kenosha, have hereto subscribed my name and affixed the seal of the said city of Kenosha, at the city of Kenosha, Wisconsin, this first day of September, A. D. 1857.

[SEAL.]

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1877, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1876, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1874, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1873, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1871, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty five dollars on the first day of March, 1870, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1868, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1867, at the People's Bank, in the

city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor*.
H. T. WEST, *Clerk*.

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1865, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor*.
H. T. WEST, *Clerk*.

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1864, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor*.
H. T. WEST, *Clerk*.

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1877, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor*.
H. T. WEST, *Clerk*.

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1875, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor*.
H. T. WEST, *Clerk*.

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1874, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor*.
H. T. WEST, *Clerk*.

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1872, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor*.
H. T. WEST, *Clerk*.

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1871, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1869, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1868, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1866, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1865, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1863, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1876, at the People's Bank,

in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1875, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1873, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1872, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1870, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1869, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1867, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1866, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1864, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1863, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

13 $25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1862, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1861, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1859, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1862, at the People's Bank, in the

city of New York, on presentation of this ooupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1860, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1859, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1861, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1860, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor*
H. T. WEST, *Clerk.*

Endorsed as follows:

Copy of within served on us this 22d day of October, 1867. John W. & A. L. Cary, def'ts att'ys. Filed October 22, 1867, in lieu of former declaration withdrawn. E. Kutz, clerk.

14 NOVEMBER 4, 1867.

This day came the defendant, by its attorneys, and filed its plea as follows, to wit:

Circuit Court of the United States for the district of Wisconsin.

Plea.

THE CITY OF KENOSHA
ads.
JOSHUA F. LAMSON. } Præcipe, Sept. 6, 1867.

And the said defendant, by John W. and A. L. Cary, its attorneys, comes and defends the wrong and injury, when, &c., and saith that it did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against it, and of this it puts itself upon the country, &c.

JOHN W. & A. L. CARY,
Defendant's Att'ys.

Endorsed as follows:

This plea served by copy Nov. 2d, 1867. The affidavit of merits now on file herein may stand as though filed with this plea, and I waive the filing of another. M. H. C.

And afterwards, to wit, at a stated term of said court, begun and held according to law at the city of Madison, in the district
15 of Wisconsin, on the first Monday of January, A. D. 1868, and on the fourth day thereof, to wit, on the ninth day of January, A. D. 1868.

Present: The Hon. Andrew G Miller, district judge, presiding, the following proceedings were had, to wit:

Trial.

JOSHUA F. LAMSON
v.
THE CITY OF KENOSHA. } At law.

This day came the parties by their counsel, and the issue herein came on to be tried, whereupon a jury was called to try the same, who came, to wit: H. A. W. McNair, Guy Wheeler, Jacob West, Stephen V. R. Ableman, Eleazer Grover, John A. Gleissner, Allen Taylor, George H. Slaughter, William H. Angell, Daniel Mowe, Charles Kilbourn and Lyman C. Draper, twelve free, honest and lawful men of the district, who were severally sworn and empanneled; and the jurors of the jury aforesaid being charged by the court on their said oaths, respectively do say that the defendant did assume and promise in manner and form as the plaintiff hath herein declared against it, and assess the damages to the said plaintiff at the sum of sixteen thousand and sixty-five dollars and ninety cents. And

came the defendants' counsel and moved the court for a new trial for reasons filed, as follows, to wit:

16 Circuit Court U. S.

Motion for new trial.

THE CITY OF KENOSHA
ads.
JOSHUA F. LAMSON.

And now comes the City of Kenosha, defendant, by John W. and A. L. Cary, its attorneys, and moves the court now here to set aside the verdict and for a new trial in this cause, for the reason that the same is contrary to law and evidence.

JOHN W. & A. L. CARY,
Def't's Att'ys.

And now, at this same term, to wit, April term, A. D. 1868, and on the tenth day thereof, to wit, on the 27th day of April, A. D. 1868, the following proceedings were had, to wit:

Motion for new trial overruled and judgment.

JOSHUA F. LAMSON
v.
THE CITY OF KENOSHA. } At law.

This day came the parties by their counsel, and the motion of defendant for a new trial being argued, it is ordered by the court that the said motion be and hereby is overruled, and it is considered and adjudged by this court now here that the plaintiff do have and recover of the said defendant, the City of Kenosha, sixteen thousand and sixty-five dollars and ninety cents, the damages so as
17 aforesaid assessed by the jury, together with forty-three dollars and forty cents, his costs about his said suit in this behalf by him expended, and that he have execution therefor.

Judgment roll signed April 27th, 1868.

EDWARD KURTZ, *Clerk.*

Damages	$16,065 90
Costs	43 40
	$16,109 30

Judgment roll filed April 27th, A. D. 1868, at five o'clock, p. m.

EDWARD KURTZ, *Clerk.*

MAY 18, 1868.

Bill of exceptions signed and filed, as follows, to wit:

Circuit Court of the United States for the district of Wisconsin.

18 *Bill of exceptions.*

JOSHUA F. LAMSON
vs.
THE CITY OF KENOSHA. } Assumpsit.

Afterwards, to wit, at the January term of said court, begun and held at the capitol in the city of Madsion, in said district of Wisconsin, on the first Monday of January, A. D. 1868, the issue so as aforesaid joined, came on to be tried before the Honorable Andrew G. Miller, district judge of said district, presiding, Matthew H. Carpenter, esq., appeard as counsel for the plaintiff; and John W. Cary, esq., for the defendant, and a jury was duly chosen, empannelled, tried and sworn, and the said plaintiff's counsel, to maintain the issue on his part, offered to read in evidence certain chapters of the private and local laws, and general laws of the State of Wisconsin, as follows, to wit: Chapter 60, of the private and local laws of the year 1853; chapter 22, 133 and 138 of the private and local laws of the year 1857; chapter 148 of the private and local laws of the year 1859; chapter 152 of the private and local laws of the year 1862; and chapter 114 of the general laws of the year 1863; to the
19 reading of which, and to each and every one of said acts, the said defendant's counsel did then and there object, which objection was overruled by the ceurt, and the said defendant's counsel then and there excepted to said ruling and decision. The said plaintiff's counsel then read in evidence from said several chapters as follows, to wit: Chapter 60 of the private and local laws of the State of Wisconsin for the year 1853, approved March 4, 1853, is entitled "An act to incorporate the Kenosha and Beloit Railroad Company," and is in the usual form of railroad charters, and authorizes the building of a railroad from the city of Kenosha to the city of Beloit, in the State of Wisconsin.

Chapter 22 of the private and local laws of the State of Wisconsin for the year 1857, approved February 14, 1857, is entitled "An act to amend an act entitled 'An act to incorporate the Kenosha and Beloit Railroad Company,'" and changes the corporate name to that of "The Kenosha and Rockford Railroad Company," and also authorizes a change of route.

Chapter 133 of the private and local laws of the State of Wisconsin for the year 1857, approved March 2, 1857, is entitled "An act to consolidate and amend the act to incorporate the city of Kenosha, and the several acts amendatory thereof."

Section 4, of chapter 6, of said chapter 133, is as follows,
20 to wit: "For any purpose, aside from what is otherwise specifically provided for in this charter, the common council

shall have power to levy and collect special taxes in the same manner that other taxes are levied and collected, and such special taxes may be levied upon such real or personal estate in the city as the council may determine, or the common council may borrow on the corporate credit of the city any sum of money, for any term of time, at any rate of interest, and payable at any place deemed expedient, issuing bonds or scipt therefor: Provided that no such tax shall be levied or money borrowed, except as shall be provided by ordinance, which ordinance shall in each case specify the amount of such tax or loan, and all other essential particulars relating thereto, and be approved by a majority of the voters of the city, possessed of a freehold estate, or occupying lots upon which they pay taxes, voting at a special election, which may be called for that purpose."

Chapter 12 of said chapter 133 is as follows, to wit:

"*Railroad commissioners.*

"Sec. 1. The railroad commissioner shall be ex-officio a member of the board of directors of the Kenosha and Beloit Railroad Company, with all the duties, responsibilities and powers incident to the office of directors under the charter of said railroad company.

"Sec. 2. It shall be the duty of said commissioner to attend
21 all meetings of the stockholders of the Kenosha Railroad Company, and to vote in person, the same as any individual stockholder in all shares of stock held by the city of Kenosha, in the stock of said company.

"Sec. 3. The railroad commissioner shall have generally the charge and control of all interest the city of Kenosha now has or may hereafter have in the Kenosha and Beloit railroad. He shall receive all funds paid into the hands of the city treasurer on account of the tax for the benefit of the Kenosha and Beloit Railroad Company, and shall hereafter redeem all scrip which has been issued to said railroad company as the same becomes due, making such provisions therefor, or recommending such measures to the common council as he may deem necessary for the protection and benefit of the tax payers of the city."

Chapter 138 of the private and local laws of the State of Wisconsin for the year 1857, approved March 2, 1857, is entitled "An act to authorize the Kenosha and Rockford Railroad Company in this State, and the Kenosha and Rockford Railroad Company, in the State of Illinois, to consolidate."

Chapter 148 of the private and local laws of the State of Wisconsin for the year 1859, approved March 7, 1859, is entitled "An act to amend the charter of the city of Kenosha," and is as follows, to wit:

"The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

22 "Section 1. The common council of the city of Kenosha shall have generally the charge and control of all interest the

city of Kenosha now has or may hereafter have in the Kenosha, Rockford and Rock Island railroad.

"§ 2. The city council shall from time to time appoint some suitable person to represent the interests of said city in said railroad, who shall hold his office at the pleasure of the council, and at such compensation as they may prescribe; and such person being duly appointed shall be ex-officio a member of the board of directors of the Kenosha, Rockford and Rock Island Railroad Company, with all the duties, responsibilities and powers incident to the office of a director under the charter of said railroad company; he shall attend all meetings of the stockholders of the Kenosha, Rockford and Rock Island Railroad Company, and vote in person the same as any individual stockholder on all shares of stock held by the city of Kenosha in the stock of said company; and shall, when required, make such communications and recommendations to the common council relative to the affairs of said railroad company as the interest of said city shall warrant, and as shall innure to the benefit of the tax payers of said city.

"§ 3. Chapter 12 of the city charter of the city of Kenosha, together with any and all provisions in said charter providing for the election of a railroad commissioner or conflicting with the pro-
23 visions of this act, embraced in "An act to consolidate and amend the act to incorporate the city of Kenosha, and the several acts amendatory thereof," approved March 2nd, 1857, are hereby repealed.

"§ 4. This act shall take effect and be in force from and after its passage."

Chapter 152 of the private and local laws of the State of Wisconsin, for the year 1862, approved March 27, 1862, is entitled "An act to enable the city of Kenosha to readjust and arrange its indebtedness," and is as follows, to wit: "The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

"Section 1. The city of Kenosha is hereby authorized to issue new bonds in exchange for the bonds and script heretofore issued by said city, now outstanding and unredeemed, or for the judgments heretofore rendered thereon, for the purpose of compromising the indebtedness of said city on such terms as may be agreed upon between the city and the holders of said bonds.

"Section 2. The bonds authorized to be issued by virtue of this act shall bear date the first day of January, A. D. 1862, shall be in such forms, contain such stipulations and conditions for such sums, each made payable where, on such time, not exceeding thirty years, at such rate of interest not exceeding five per cent. per annum, and for such amounts not exceeding fifty per cent. of the indebtedness of said city on the first day of January, A. D. 1862, as may be agreed upon between the city and the holders of said bonds. All agree-
ments authorized by this act, made between the city and bond-
24 holders, and the issuing of the new bonds, shall be carried into effect by the adoption of ordinances by the city council.

Section 3. All taxes to be raised for the payment of the principal

and interest of the bonds issued by virtue of this act shall be levied upon and collected from the real estate in said city, in the manner hereinafter provided.

Section 4. At the annual election for [the] city officers held on the first Tuesday in April, A. D. 1862, there shall be chosen by ballot four commissioners, one residing in each ward of said city, and being freeholders therein, who shall within sixty days after their election make a new assessment of all the real estate within the limits of said city, and of such portion of the town of Pleasant Prairie formerly being within the limits of said city, as is liable for the payment of the indebtedness of said city: Provided, that in case the ordinance as hereinafter provided shall not, by the first Teusday in April, be ratified by the voters of said city, then such election shall take place at any time thereafter when directed by the common council. Such election shall be conducted in all respects like the election for city officers, as provided by chapter three of the city charter. Said four commissioners shall within sixty days after their appointment make an assessment of all the real estate aforesaid, which assessment shall be taken as a basis and used for the purpose of levying and collecting all taxes to be raised for the payment of both the principal and interest of the bonds authorized by this act, provided said assessment shall first be corrected and equalized by the commissioners aforesaid, acting with four additional freeholders to be appointed by the common council, as a board of equalization, in the same manner as now provided by law for the equalization of other assessments, and shall thereafter be irrevocable, except for the correction of errors in the description of property or the omission of taxable property that should be upon the assessment roll, which the city council are authorized to correct whenever discovered. After the correction and equalization of said assessment it shall be recorded in a book kept for that purpose, which shall show the names of the owners of each subdivision of property in the city and its apprized [appraised] value, and shall also show the amount of the apportionment which each piece of property is liable to pay on account of said bonds for principal, and the annual tax for interest on the same, as apportioned and levied, as hereinafter provided. Said book shall be kept by the city treasurer.

"Section 5. After the issue by the city of the bonds authorized to be issued by virtue of this act, and they shall have been accepted in exchange and discharge of the old bonds for their better security and more prompt payment, the city council shall equally apportion and levy the full amount of said bonds upon the real estate of the city as assessed and subdivided on the assessment as provided in section 4 of this act, and as such apportionment and levy is completed and signed by the mayor of the city and attested by the clerk: they, the said bonds, shall be a lien upon all the real estate of the city as apportioned and levied upon the several subdivisions of the same, and shall so remain a lien until said bonds are paid in full and discharged as hereinafter provided.

"Section 6. After the issue of said bonds, the city council shall

annually levy and collect a tax sufficient to provide for the payment on [of] the interest of said bonds (the principal of which remaining unpaid,) and also for a sinking fund as hereinafter provided, which tax shall be levied and collected at the same time and in the same manner as provided by law for the collection of other taxes in said city, but always upon the same assessment as provided in section 4 of this act. All taxes levied and collected by virtue of this act for the payment of interest or any part of the principal, shall be upon a seperate [separate] tax-roll, and all moneys collected shall be kept distinct and seperate [separate] from other moneys of the city, shall be seperately [separately] returned to the county treasurer in case such taxes thereon are not paid, and upon the sale of the lands for the non-payment of such taxes, seperately [separate] certificates and deeds shall be given and all taxes levied for interest as aforesaid, or for a sinking fund, shall be a prior lien on all the real estate, to all other city taxes levied of the same year."

"Section 7. In the year (A. D.) 1870, and annually thereafter, the city council of said city shall, in addition to a tax levied for the payment of interest on said bonds, levy and collect by tax upon the real estate, upon the same assessment provided for in section 4 of this act, a sum sufficient to pay off the entire principal and discharge in full said bonds, by the time they shall become due, which shall be denominated the sinking fund tax. All moneys paid into the city treasurys for the discharge of any piece or pieces of property from the apportionment of said bonds for principal, shall be credited to the sinking fund. From time to time, when an amount shall accrue in the treasury belonging to the sinking fund sufficient to purchase one or more of the bonds issued under this act, it shall be applied to the purchase of said lands [bonds] until they are all redeemed.

"Section 8. All coupons for interest on said bonds shall be taken in payment of the taxes levied to pay the same, and the bonds shall at all times be taken in payment for any part of the principal.

"Section 9. The owner or owners of any particular lot or lots, block or blocks, piece or pieces of property in said city, may at any time pay over to the treasurer of the city the amount of the principal due on said bonds levied and [and] apportioned upon the same, in cash or bonds, and any unpaid tax for interest due at the time; and whenever any amount shall be paid as aforesaid, being in full of the apportionment of said bonds levied upon any particular piece of property, the owner or owners thereof shall receive a certificate of discharge signed by the mayor and treasurer of the city and attested by the clerk, which certificate may be recorded in the office of the register of deeds for Kenosha county, and shall forever discharge the property therein described from all further liability to pay any part of said bonds either for principal or interest, and [be] a full discharge from all liens heretofore created in consequence of the same; and no taxes shall therefore [thereafter] be imposed upon such property thus discharged by the city of Kenosha or city council, or by any other authority, for the purpose of paying any part of said bonds for principal or interest that may remain unpaid.

"Section 10. Upon the sale of any property for delinquent taxes for the interest or sinking fund, or principal of said bonds,
29 the city shall purchase the same and shall hold the certificates of sale for the benefit of, and in trust for, the holders of said bonds; and if the said property shall not be redeemed from such sales as required by law, the city may take tax deeds of such property, either in its own name or in the name of some person as trustees [trustee] for the holders of said bonds; and the property thus acquired shall be held in trust for the holders of said bonds, and may at any time be sold, leased or otherwise disposed of, under the direction of the common council, in such manner as shall be in their opinion most to the advantage of the city and the bondholders, and the proceeds thereof applied in liquidation of the said bonded debt. Such property may be sold either subject to future taxes on account of said city indebtedness, or free therefrom. In the former case, it shall not be sold for less than the amount then due on said property for delinquent taxes, interest and costs. In the latter case, it shall not be sold for less than the amount of such delinquent taxes, interest and costs, together with the proportion of the bonded debt which may be assessed against such property, and payment for such property may be made in coupons or [or] bonds as the case may be. The holders of
30 unpaid and past due coupons may at any time exchange said coupons for any certificates for the sale of lands for delinquent taxes, which may be in the possession of said city in trust as aforesaid, of an equal amount; provided, that no such exchange or sale shall be made unless the purchaser shall take all such certificates in the possession of said city upon any particular parcel of land.

"Section 11. At the time and place where the four commissioners for making a new assessment are chosen as before provided, a commissioner or commissioners, not to exceed three discreet men, as may be directed by the city council, being a freeholder or freeholders of said city, shall in like manner be chosen to conduct the regulations for a compromise of the old indebtedness, to meet and confer with the bond holders of the city, to receive and make propositions of settlement, &c , who shall report his or their doings to the city council.

"Section 12. At once, after the passage and publication of this act, the common council shall pass an ordinance authorizing the mayor and clerk of the city to execute and deliver the bonds as authorized by this act, in satisfaction of the outstanding and unpaid indebtedness of said city. The rate per cent. of new bonds to be given for former indebtedness on this amount of new bonds to
31 be issued as aforesaid; the time of payment, rate of interest, &c., shall be distinctly stated and set forth, which ordinance shall be submitted to a vote of the freeholders of the city, after having first been published at least two weeks in the city papers. After the publication of the ordinance as aforesaid, the city council shall call an election of the freeholders of the city who are qualified voters by the laws of the State, and fix the time and manner of holding the same, at which a vote will be taken for or against said ordinance. The vote shall be by ballot, on which shall be written or printed,

"for the ordinance," or "against the ordinance." At such election none but freeholders of said city who are qualified electors by the laws of this State [shall] be qualified to vote. If a majority of all the votes cast at any such election shall be in favor of such ordinance, then shall the mayor and city clerk execute and deliver the bonds as aforesaid, authorized by this act; if against said ordinance, the city council may, upon a different basis as to amount, rate of interest, or time of payment, to be in like manner set forth by ordinance, a second or a third time submit the question to a vote of the freeholders as herein provided; provided however, that no bonds shall be issued by the city of Kenosha, as authorized by this act, until
32 a majority of all the votes cast at an election, as herein provided, shall be in favor of the same.

"Section 13. This act shall take effect and be in force from and after its passage.

"Approved March 27, 1862."

Chapter 114 of the general laws of the State of Wisconsin for the year 1863, approved March 26, 1863, is entitled "An act to authorize the city of Kenosha to compromise its bonded indebtedness, and to repeal chapter 152 of the private and local [general] laws of 1862, entitled 'An act to enable the city of Kenosha to readjust and arrange its indebtedness,'" and is as follows, to wit:

"The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

Section 1. The city of Kenosha is hereby authorized to issue new bonds in exchange for the bonds and script heretofore issued by said city, on harbor and railroad account, now outstanding and unredeemed, or for the judgements [judgments] heretofore rendered thereon, for the purpose of compromising the indebtedness of said city on such terms as may be agreed upon between the city and its creditors.

Section 2. The bonds authorized to be issued by virtue of this act shall bear date at the time when issued, shall be in such forms, contain such stipulations and conditions for such sums, at
33 such rate of interest not exceeding seven per cent., and for such amounts not exceeding twenty per cent. of the indebtedness of said city, on the first day of January, 1863, as may be agreed upon between the city and its creditors. The interest on said bonds shall be payable annually on the first day of June in each year, at the office of the treasurer of the city of Kenosha, and the principal shall be payable twenty-five years from the first day of June, 1863; but by the terms of said bonds the same shall be redeemable at pleasure of said city, at any time after five years from the date of the same.

"Section 3. After the issue of said bonds the city council shall annually levy and collect a tax sufficient to provide for the payment of the interest on said bonds, which tax shall be levied and collected upon all real and personal property within said city subject to taxation, at the same time and in the same manner as provided by law for the collection of other taxes in said city. All coupons for interest

on said bonds shall be receivable in payment of all city taxes, except taxes levied for school purposes.

"Section 4. Royal B. Towsley, Harvey Durkee, Andrew
34 Schoffen and George Bennett of said city, are hereby appointed commissioners to conduct the negotiations for a compromise of the old indebtedness, to meet and confer with the creditors of the city, and to receive and make propositions for the settlement of said indebtedness. Said commissioners may act separately or in concert, and all action by them taken shall be reported by them to the city council.

"Section 5. After the commissioners appointed as aforesaid shall have reported to the city council any proposition, by them received, for the settlement of the city indebtedness which shall be satisfactory to said city council, said city council shall pass an ordinance authorizing the mayor and clerk of said city to execute and deliver the bonds authorized by this act in satisfaction of the outstanding indebtednes of said city. The rate per cent. of new bonds to be given for former indebtedness, the time of payment, rate of interest, &c., shall be fully set forth in said ordinance, which ordinance shall thereupon be published for two weeks in some newspaper printed in said city. After such publication, said ordinance shall be submitted to a vote of the qualified electors of said city, at a time to be ap-
35 pointed by said common council. The vote shall be by ballot, on which shall be printed the words, "for the ordinance" and [or] "against the ordinance." If a majority of the votes cast at any such election shall be in favor or such ordinance, then shall the mayor and city clerk issue and deliver the bonds as aforesaid; if against such ordinance, the city council may, upon a different basis as to amount, rate of interest and time of payment, to be in like manner set forth by ordinance, from time to time submit the question to a vote of the electors of said city, as hereinbefore provided. No bonds shall be issued by virtue of this act until a majority of all the votes cast at an election, as herein provided, shall be in favor of the same.

"Section 6. In case any of the commissioners hereinbefore named shall decline to act, his place may be filled by appointment by the city council.

"Section 7. In the year 1868, and annually thereafter, the city council of said city shall in addition to the tax levied for the payment of interest on said new bonds, levy and collect an additional tax for the purpose of creating a sinking fund for the redemption of said bonds. Said tax shall be for each of the five years, com-
36 mencing with 1868, two and one-half per cent. of the entire indebtedness of said city as evidenced by said bonds; for each of the five years commencing with 1873, five per cent. of the gross indebtedness as aforesaid; and for each of the five years commencing with 1878 seven and one-half per cent. of said gross indebtedness; and for each of the five years commencing with 1883 ten per cent. of such gross indebtedness. Then from time time, when an amount shall accrue in the treasury belonging to the sinking fund sufficient to purchase one or more of the bonds issued under this act, it shall be so applied.

"Section 8. Chapter one hundred and fifty-two of the private and local [general] laws of 1862, entitled "An act to enable the city of Kenosha to readjust and arrange its indebtedness," is hereby repealed.

"Section 9. This act shall take effect and be in force from and after its passage and publication, approved March 26, 1863."

The said defendant's counsel then admitted, at the request of plaintiff's counsel, that the name of the "Kenosha and Rockford Railroad Company" was changed to the Kenosha, Rockford and Rock Island Railroad Company.

37 The plaintiff's counsel then offered in evidence bond numbered 127, purporting to have been issued by the defendant, to which the defendant's counsel objected; the court overruled the objection and the defendant's counsel then and there excepted to said ruling and decision, and said bond was read in evidence as follows, to wit:

38 STATE OF WISCONSIN, UNITED STATES OF AMERICA:

$500. *Bond of the city of Kenosha, No.* 127. Loan $100,000.

Issued according to law to the Kenosha and Rockford Railroad Company, to aid in the construction of their railroad.

The city of Kenosha, Wisconsin, hereby acknowledges itself justly indebted to Josiah Bond, or bearer, and for value received promises to pay to him or bearer, twenty years from the date hereof, at the People's Bank in the city of New York, the sum of five hundred dollars, with interest at the rate of ten per cent. per annum, payable semi-annually, upon presentation of the proper coupons, at the said People's Bank, for the said interest. For the just and true payment of the said sum of five hundred dollars and the interest thereon, as herein set forth, to the said Josiah Bond, or bearer, the faith of the said city of Kenosha is hereby irrevocably pledged.

This bond is hereby certified to be issued in pursuance of an act of the legislature of the State of Wisconsin, passed at a session thereof in the year 1857, approved March 2, 1857, giving the city of Kenosha authority to loan its credit for the purposes therein specified, and also in pursuance of a vote of the freeholders of the city of Kenosha, taken for that purpose, after due notice given, authorizing a loan of $100,000 in aid of the Kenosha and Rockford Railroad Company.

In witness whereof, I, the mayor of Kenosha, have hereto subscribed my name, and affixed the seal of the said city of Kenosha, at the city of Kenosha, Wisconsin, this first day of September, A. D. 1857.

[SEAL.] GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1877, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1876, at the People's Bank, in the city of New York, on the presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1874, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1873, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1871, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty five dollars on the first day of March, 1870, at the People's Bank, in the city of New York, on the presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1868, at the People's Bank, in

the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1867, at the People's Bank, in the city of New York, on the presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1865, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1864, at the People's Bank, in the city of New York, on the presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1877, at the People's Bank, in the city of New York, on the presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1875, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1874, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1872, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1871, at the People's Bank, in the city of New York, on presentayion of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1869, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1868, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1866, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1865, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1863, at the People's Bank, in

the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1876, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1875, at the People's Bank, in the city of New York, on the presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1873, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1872, at the People's Bank, in the city of New York, on the presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1870, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1869, at the People's Bank, in the city of New York, on the presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1867, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor*,
H. T. WEST, *Clerk*.

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1866, at the People's Bank, in the city of New York, on the presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor*.
H. T. WEST, *Clerk*.

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1864, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor*.
H. T. WEST, *Clerk*.

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1863, at the People's Bank, in the city of New York, on the presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor*.
H. T. WEST, *Clerk*.

39 $25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1862, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that pay on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor*.
H. T. WEST, *Clerk*.

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1861, at the People's Bank, in the city of New York, on the presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor*.
H. T. WEST, *Clerk*.

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1859, at the People's Bank, in

the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1862, at the People's Bank, in the city of New York, on the presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1860, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1861, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of September, 1861, at the People's Bank, in the city of New York, on presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1860, at the People's Bank, in the city of New York, on the presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this 1st day of September, 1857.

GEO. H. PAUL, *Mayor.*
H. T. WEST, *Clerk.*

40 The counsel for the plaintiff then offered in evidence the five hundred and sixteen coupons described in the declaration and notice, to the reading of which in evidence the defendant's counsel objected. The court overruled the objection, and the de-

fendant's counsel then and there excepted to said ruling and decision.

The counsel for the plaintiff then read in evidence the said five hundred and sixteen coupons, which (excepting the times payable) were as follows, to wit:

"$25. The city of Kenosha, Wis., will pay to the bearer twenty-five dollars on the first day of March, 1863, at the Peoples' Bank, in the city of New York, on the presentation of this coupon, being the interest due that day on the bond of said city, numbered , dated this first day of September, 1857.

"GEO. H. PAUL, *Mayor.*
"H. T. WEST, *Clerk.*"

That of the said conpons, so as aforesaid produced and read in evidence, only twelve were attached to said bond number 127, and the remainder were not coupons of that bond, but were coupons from different bonds, purporting on their face to be coupons of the same issue of bonds. The defendant's counsel, at the request of the plaintiff's counsel, admitted that the Kenosha and Rockford Railroad Company, in Wisconsin, was consolidated with a company of
41 the same name in Illinois.

Here the plaintiff rested.

The foregoing is all the testimony given on said trial.

The defendant's counsel then requested the court to instruct said jury as follows:

First. That the bonds declared on, as well as the coupons which had been attached thereto, claimed to be due, should have been produced in evidence, in order to sustain the declaration under the issue, and that there could be no recovery except for the amount of the coupons which belonged to said bond number 127.

Second. That there was no authority in the city of Kenosha to issue said bonds.

Third. The coupons do not import a consideration, and none has been proven.

But the said judge did then and there refuse so to instruct said jury as requested, but on the contrary instructed them to return a verdict in favor of the plaintiff for the amount of all of said coupons; to which ruling and instruction so given, and said refusal to charge as requested, the counsel for the defendant did then and there except.

The jury thereupon returned a verdict for the plaintiff, and assessed his damages at the sum of $16,065 90.

And the said counsel for the said defendant, at the same
42 January term of said court, to wit, on the 9th day of January, 1868, filed a motion to set aside said verdict, and for a new trial, in the words and figures following, to wit:

"And now comes the city of Kenosha, defendant, by John W. & A. L. Cary, its attorneys, and moves the court now here to set aside

the verdict and for a new trial in this cause, for the reason that the same is contrary to law and evidence.

"JOHN W. & A. L. CARY,
Def't's Att'ys.

Which said motion was afterwards and at the April term, A. D. 1868, of said court overruled; to which ruling and decision the defendant's counsel then and there excepted.

And because none of the said rulings, decisions and exceptions appear of record, the said judge has, at the request of the said defendant's counsel, signed and sealed this bill of exceptions this 18th day of May, A. D. 1868.

[SEAL.] A. G. MILLER.

Bond for costs on writ of error.

NOVEMBER 21, 1868.

This day came the defendant's counsel and filed the bond of Haynes French and Daniel Head, in the penalty of five hundred dollars, conditioned that the defendant shall prosecute a writ of error to effect, &c., which bond is as follows:

Circuit Court of the United States for the 7th circuit and district of Wisconsin.

JOSHUA F. LAMSON
vs.
THE CITY OF KENOSHA. } In error.

43 Know all men by these presents, that we, Haynes French and Daniel Head, of the city of Kenosha, in the State of Wisconsin, are held and firmly bound unto the above-named Joshua F. Lamson, in the sum of five hundred dollars, to be paid to the said Joshua F. Lamson, his executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals and dated the 18th day of August, A. D. 1868.

Whereas the above named, the city of Kenosha, hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the Circuit Court of the United States for the district of Wisconsin:

Now, therefore, the condition of this obligation is such, that if the above-named, the city of Kenosha, shall prosecute its said suit of error to effect, and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

HAYNES FRENCH.
DANIEL HEAD.

Sealed and delivered in presence of—
G. T. VAN ARSDALE.

Endorsed as follows: Nov. 21, 1868. Approved. A. G. Miller, dis. judge.

Whereupon a writ of error and citation issued and copy of writ of error lodged for defendant in error.

44 UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

I, Edward Kurtz, clerk of the Circuit Court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file and remaining of record in my office, being a full and complete exemplification of the record and proceedings in the suit of Joshua F. Lamson vs. The city of Kenosha, except proceedings subsequent to judgment relative to obtaining mandamus.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district of Wisconsin, this seventh day of December, in the year of our Lord one thousand eight hundred and sixty-eight and of the independence of the said United States the ninety-third.

[SEAL.] EDWARD KURTZ, *Clerk.*

45 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the Circuit Court of the United States of America for the district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment, in a plea which is in the said Circuit Court of the United States of America for the district of Wisconsin, before you, between Joshua F. Lamson, plaintiff, and the city of Kenosha, defendant, a manifest error hath happened to the great damage of the said The city of Kenosha, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; you are hereby commanded, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, that of right and according to law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this twenty-first day of November, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of the United States the ninety-third.

[SEAL.] EDWARD KURTZ, *Clerk.*

46 The United States of America to Joshua F. Lamson, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States of America for the district of Wisconsin, wherein the City of Kenosha is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this twenty-first day of November, in the year of our Lord one thousand eight hundred and sixty-eight, and of our independence the 93rd.

[SEAL.] A. G. MILLER, *District Judge.*

I accept service of above citation this 26th day of November, 1868.

M. H. CARPENTER,
Att'y for Def't Error.

SUPREME COURT

OF THE

UNITED STATES.

DECEMBER TERM, 1869.

No. 142.

THE CITY OF KENOSHA, *Plaintiff in Error*,

vs.

JOSHUA F. LAMPSON.

No. 143.

THE CITY OF KENOSHA, *Plaintiff in Error.*

vs.

JOSHUA F. LAMPSON.

Brief and Points of Plaintiff in Error.

JOHN W. CARY, *Of Counsel.*

Starrs' Print, Milwaukee.

SUPREME COURT

OF THE

UNITED STATES.

NO. 142. DECEMBER TERM, 1869.

THE CITY OF KENOSHA, *Plaintiff in Error*,

vs.

JOSHUA F. LAMPSON, *Defendant in Error.*

The writ of error in this case is prosecuted to reverse a judgment of the Circuit Court for the District of Wisconsin, rendered against the City of Kenosha. The suit was commenced, August 29th, 1867. The declaration is in debt for the interest on certain municipal bonds purporting to have been issued by the plaintiff in error, but whether it is on the supposed bonds or the coupons which were thereto attached, is not entirely free from doubt. There are a great number of counts differing only in the number of the bonds described and the times when the interest coupons became due. The first and second counts are in the words following to-wit :

"For that whereas the said defendant heretofore, to-wit : on the "first day of September, A. D. 1857, being thereto by law duly "authorized, made, executed and delivered to Josiah Bond its bonds, "under its seal, signed by its Mayor and Clerk, two hundred in "number, in sums of five hundred dollars each, numbered from No. 1 "to No. 200, inclusive, each for the sum of five hundred dollars, dated "the day and year last aforesaid, a copy of each of said bonds or "writings obligatory, except the numbers thereof, with coupons there- "to attached, is hereto attached, and marked Exhibit No. 1, that all "of said bonds were of like tenor and effect, except the numbers there-

"of varying as aforesaid, and that the said defendant immediately "thereafter delivered said bonds, in all amounting to the sum of one "hundred thousand dollars, to said Josiah Bond, in aid of the con- "struction of the railroad of a corporation then known by the name "of the Kenosha and Rockford Railroad Company; which railroad "ran in and through the City of Kenosha, and from thence westward "in said State of Wisconsin; and that said last named company "thereafter, with the knowledge and consent of the defendant, sold "and disposed of said bonds, with the coupons thereto attached, to "bona fide holders, and the same have since passed from hand to "hand in the stock markets of the United States, like other negoti- "able securities; so that the said plaintiff cannot produce any one of "said bonds here to said Court; and the Legislature of the State of "Wisconsin by an act entitled, "An act to amend the chapter [char- "ter] of the City of Kenosha," approved March 17, A. D. 1859, "ratifying the said bonds; that in and by one of said bonds or writ- "ings obligatory, No. 167, the said defendant acknowledged itself "justly indebted to the said Josiah Bond or bearer, and for value "received promised to pay him or bearer, in twenty years from the "date thereof, at the People's Bank in the City of New York, the "sum of five hundred dollars, with interest at the rate of ten per "cent. per annum, payable semi-annually upon presentation of the "proper coupons at the said People's Bank for the said interest; for "the just and true payment of the said sum of five hundred dollars, "and the interest thereon, as aforesaid, to the said Josiah Bond or "bearer, the faith of the said defendant was thereby irrevocably "pledged; and the said bond or writing obligatory was duly certified "in said bond by Geo. H. Paul, Mayor, and H. T. West, Clerk of "the said defendant, under the corporate seal of the said defendant, "to be issued in pursuance of an act of the Legislature of the State "of Wisconsin, and also in pursuance of a vote of the freeholders of "the City of Kenosha, taken for that purpose, after due notice given, "authorized a loan of one hundred thousand dollars, in aid of the "Kenosha and Rockford Railroad Company; and whereas the inter- "est upon said sum of five hundred dollars, which the said defendant, "in and by the said last named writing obligatory, agreed to pay on "the first day of September, A. D. 1864, the said defendant hath

"never paid, although often requested, but hath hitherto wholly neg-
"lected and refused, and still doth refuse, to pay the same or any part
"thereof; and the coupon attached to said bond for the neglect and
"amount of said interest, which became due and payable at the time
"last aforesaid, the defendant hath never paid, but the same is now
"owned and held by the said plaintiff, and the said plaintiff brings the
"same into Court here to be cancelled."

"And also in a further plea, that the said defendant render to the
"said plaintiff the other sum of twenty-five dollars, lawful money of
"the United States, which it owes to and unjustly detains from the
"said plaintiff; for that whereas in and by another of said bonds men-
"tioned and described in the first count of this declaration, viz:
"bond numbered 48, (a copy of which last named bond, with interest
"warrants thereto attached, except the number thereof, is hereto at-
"tached, and marked Exhibit No. 1,) the said defendant acknowledged
"itself to owe and agreed to pay to the same company the sum of five
"hundred dollars, at the same time, with interest at the same rate and
"payable at the same times, as in and by the said writing obligatory,
"particularly mentioned in said first count; and for that the said de-
"fendant hath never paid the said interest which said defendant, in
"and by said last named writing obligatory agreed to pay on the first
"day of March, A. D. 1861 (being the sum of twenty-five dollars last
"above demanded); but hath wholly neglected and refused so to do;
"and that the interest warrant attached to said last named bond for the
"amount of interest payable at the time last aforesaid, the said defen-
"dant hath never paid, but the same is now held and owned by said
"plaintiff, and the plaintiff brings the same into court here to be can-
"celled."

All the remaining counts are precisely like the second count except in the number of the bonds and times when the coupons became payable.

Record pp. 3 to 75, inclusive.

Attached to the declaration as exhibits No. 1, is the copy of a bond of the series described with the coupons thereto attached. Record pp. 75 to 81.

The declaration as originally drawn contained nearly seven hundred counts, but on the trial all were withdrawn except about one hundred and seventy-two. Those withdrawn were not returned to this court, consequently the counts returned are not in the order they were originally pleaded.

Record pp. 83 and 84.

To this declaration the defendant below interposed the pleas of *nil debet* and *non est factum*, and *actio non accrevit* as to all the counts now contained in the declaration.

Record pp. 82 and 83.

The plaintiff replied to the first and second pleas by adding the *similites*, and demurred to the third plea.

Record pp. 84 and 85.

On the trial, by direction of the Court, defendant withdrew the plea of *non est factum*, and the demurrer was sustained Record p. 85.

The jury returned a verdict for the plaintiff for $4,300, and the defendant moved for a new trial. 1st. Because there was no proof to support the declaration. 2d. Because there was no authority in the city of Kenosha to issue such bonds. 3d. Because said verdict is contrary to the laws and evidence.

Which motion was overruled.

On the trial the plaintiff's counsel offered to read in evidence certain chapters of the private and local laws of the State of Wisconsin hereinafter named, to the reading of which defendant's counsel objected, which objection was overruled, and the defendant excepted, and said acts were read in evidence as follows:

Chapter 60, approved March 4th, 1853, entitled, An Act to incorporate the Kenosha and Beloit Railroad Company, and which is in the usual form of railroad charters.

Chapter 22, approved February 14th, 1857, which is An Act to amend said railroad charter, and simply changes its corporate name to Kenosha & Rockford Railroad Company, and authorizes a change of route.

Chapter 133, approved March 2d, 1857, entitled, An Act to consolidate and amend the act to incorporate the city of Kenosha and

the several acts amendatory thereof, and particularly section 4 of chapter 6 of said chapter 133.

Said amended charter, chapter 12, also provided for a Railroad Commissioner, and prescribed his duties.

Chapter 138, approved March 2d, 1857, An Act to authorize the Railroad in Wisconsin to consolidate with the one in Illinois, was read in evidence; also chapter 148, approved March 17th, 1859, amending the City Charter of 1857, relative to election of Railroad Commissioners, and repealing the provisions upon that subject in that Charter.

Chapter 151 (152 meaning) approved March 27th, 1862, entitled, An Act to enable the City of Kenosha to re-adjust and arrange its indebtedness was also read.

Record, pp. 89 to 93.

Also chapter 114, approved March 26th, 1863, entitled, An Act to authorize the City of Kenosha to compromise its bonded indebtedness and to repeal said chapter 152 of the laws of 1862 last above named.

Record, 93 to 95.

But it was not pretended that any action was ever taken under either of these laws by the city authorities.

The defendant admitted the name of the Kenosha & Rockford Railroad Company was changed to Kenosha, Rockford & Rock Island Railroad Company; and that the roads in Wisconsin and Illinois were consolidated.

The plaintiff's counsel then offered bond 127 of the series described with coupons attached in evidence. Defendant objected; court overruled; objection, and defendant excepted, and said bond and coupons were read in evidence.

Record, pp. 95 to 102.

The plaintiff's counsel then offered in evidence the one hundred and seventy two coupons described in said declaration and notice, to the reading of which in evidence the defendant's counsel objected, which was overruled and defendant excepted; and said coupons were then read in evidence.

That of the coupons so read only four had been attached to said bond 127, and the remainder were not coupons of that bond, but were coupons from different bonds, purporting on their face to be coupons of the same issue of bonds. No other bonds were offered in evidence, and the foregoing is all the testimony given on said trial.

The defendant's counsel then required the Court to instruct said jury as follows:

1st.—That the bonds declared on as well as the coupons which had been attached thereto, claimed to be due, should have been produced in evidence in order to sustain the declaration under the issue. And that there could be no recovery except for the amount of the coupons which belonged to said bond number 127.

2d.—That there was no authority in the City of Kenosha to issue said bonds.

But that the said Judge refused so to instruct said jury, but instructed them to return a verdict for the plaintiff for the full amount of said coupons.

To which ruling and refusal the said defendant's counsel did then and there except.

The judgment should be reversed for the following reasons:

I.

If the declaration was upon the coupons, the plea of *action non accrieveit en sex annos* should have been sustained and the plaintiff's demurrer thereto overruled for all the coupons recovered upon were more than six years past due. It was therefore error to sustain said demurrer and overrule said plea.

II.

If the declaration counts upon the bonds, then the plea of nil debet

not having been demurred to put in issue every fact necessary to the plaintiff's recovery.

1 Chitty's Pleadings.

It was therefore necessary for the plaintiff to recover on that issue, not only to produce and give in evidence the coupons, but also the bonds from which they had been taken. The declaration alleged the making of certain bonds, and that these coupons were the interest warrants thereto attached. These facts were all put in issue by the plea, and in order to recover they should all have been proved. It is preposterous to claim that a recovery could be had upon these bonds without producing them, when they were counted upon as the cause of action and their existence denied by the plea. There was no proof that any such bonds had ever been made. It may well be questioned whether a recovery for interest can be had, on a coupon bond, where the pleader counts upon the bond alone. This court has held that a recovery can be had upon the coupon as a separate instrument. The absence of the coupon from such a bond is evidence that the interest on the bond has been paid, and that the holder of the bond is not entitled to the interest. The Court will not hold that the holder of the coupon is entitled to maintain a suit upon it, and at the same time hold that an action may be maintained upon the bond for the same purpose.

The coupons were barred by the Statute, therefore no action could be sustained on them.

And if the recovery in this case was upon the bonds the coupons were no evidence to sustain it, therefore the judgment should be reversed.

III.

The only pretence of authority in the City to issue these bonds is section 4 of chapter 6, of the above named chapter 133, of the private and local laws of 1857 entitled, An Act to consolidate and amend the Act to incorporate the City of Kenosha, and the several Acts amendatory thereof, and is as follows :

"For any purpose, aside from what is otherwise specifically pro-
"vided for in this Charter, the Common Council shall have power to
"levy and collect special taxes, in the same manner that other taxes
"are levied and collected, and such special taxes may be levied upon
"such real and personal estate in the City as the Council may deter-
"mine, or the Common Council may borrow, on the corporate credit
"of the City, any sum of money, for any term of time, at any rate
"of interest and payable at any place deemed expedient, issuing
"bonds or scrip therefor; provided that no such tax shall be levied or
"money borrowed except as shall be provided by ordinance, which
"ordinance shall in each case specify the amount of such tax or loan,
"and all other essential particulars relating thereto, and be approved
"by a majority of the voters of the City, possessed of a freehold
"estate, or occupying lots upon which they pay taxes, voting at a
"special election, which may be called for that purpose."

This Act was a mere compilation, with some verbal amendments, of the laws then in force, relative to said City of Kenosha, and this section is but a re-enactment of section 8 of the amendments of the Charter of Kenosha, approved March 23d, 1853. The verbiage is slightly changed, but not the substance. Said section 8 is as follows:

"SECTION 8. The city council shall have power to levy and collect
"special taxes for any purpose (aside from what may be specially
"provided for in the charter) which may be considered essential to
"promote or secure the common interest of the city; or may borrow
"on the corporate credit of the city for such purposes, any sum of
"money for any term of time, at any rate of interest not exceeding
"ten per centum, and payable at any place that may be deemed ex-
"pedient. Bonds or scrip may be issued therefor under the seal of
"the corporation, and the resources and credit of the city pledged for
"the re-payment of the sums so borrowed, with the interest on the
"same. All such moneys shall be expended under the direction of
"the city council; but no such tax shall be levied, or money bor-
"rowed, except in accordance with the provisions of section forty-
"four of the city charter, and in all cases when questions under this
"section are submitted to qualified voters, the amount and object of
"the proposed tax or loan shall be specifically stated to be voted

"upon. Taxes for any of the objects here contemplated shall be "levied exclusively upon all the lots and lands in said city not ex- "empt from taxation by laws of this State or United States, and not "including or estimating any improvements made thereon."

Private and Local Laws of 1853, page 304.

There is no substantial difference even in the phraseology of these sections and none whatever in their substance and effect. The phrases of the section are somewhat transposed but not its meaning or effect, and there can be no doubt, that it was the intention of the Legislature in enacting this section to re-enact substantially the former section eight. Neither is there any doubt that this section, so far as the constitutional power to pass it is in question, must have precisely the same construction that would be given to said section eight. And by the well settled rules for the construction of Statutes any construction of, or decision upon, the provisions of said section eight, would be applicable to and binding upon the same court in construing the provisions of this Statute. So far as the power of the Legislature is concerned to pass said sections no distinction can be made between them. If one is obnoxious to the provisions of Section 3, Article 11 of the Constitution, the other is equally so. In fact they must be considered by all Courts as the same section and construed the same as if the one had not taken the place of the other. The same rule is applicable, that would apply in cases of revision of statutes where the revision repeals and re-enacts a provision of a former statute at the same time and in the same terms.

Regarding this section so far as the questions in this case are concerned, but as the re-enactment of said section eight, the second and third points presented in the case of Campbell, are here again repeated and insisted upon as conclusive of the question on the merits in this case. I therefore say,

IV.

There was no authority in the City of Kenosha to issue these bonds and they are therefore void.

(In what follows in this brief I desire the Court to read word "scrip" "bonds" and regard what is said of section 8—as section 4 of Chapter 6 of Chapter 133 of the private and local laws of 1857.)

The plaintiff, in order to recover, was bound to show affirmatively, that such authority existed. There was no presumption in his favor on this point.

In the case of Thompson vs. Lee County, 3 Wallace, 330, this Court say :

"A county or other municipal corporation, has no inherent right "of legislation, and cannot subscribe for stock in a public improve- "ment, unless authorized to do so by the Legislature. Such a cor- "poration acts wholly under a delegated authority, and can exercise "no power which is not in express terms, or by fair implication, con- "ferred upon it. But the legislator of a State, unless restrained by "organic law, has the right to authorize a municipal corporation to "take stock in a railroad or other work of internal improvement, to "borrow money to pay for it and to levey a tax to repay the loan."

The question, therefore, for our consideration is, was the city of Kenosha authorized to issue these bonds in aid of said railroad company ?

The pretended authority upon which the city acted, as we have already seen, was Section 8, of the amendment to the City Charter, approved March 23d, 1853, and the ordinance and other proceedings, passed by said city, in pursuance of said act. Record pp. 259 to 262

We deny that said act and the proceedings under it were any authority for the issue of said scrip or orders, for the reason that said section 8 of said act was in direct contravention of Section 3 of Article 11 of the Constitution of the State of Wisconsin, which is as follows :

"It shall be the duty of the legislature, and they are hereby em- "powered, to provide for the organization of cities and incorporated "villages, and to restrict their power of taxation, assessment, bor- "rowing money, contracting debts, and loaning their credit, so as to "prevent abuses in assessments and taxation, and in contracting "debts by such municipal corporations."

Said section 8, purports to confer upon said city of Kenosha, by way of amendment of its charter, unlimited power in all these particulars, and is therefore void, as being in conflict with said provision. Argument can hardly make this proposition more plain. The constitution makes it the *express duty* of the legislature to restrict the power of such corporations in these matters ; but the legislature, as if in open defiance of its mandate, has attempted to grant to this city unlimited power, to levy and collect special taxes for any purpose which may be considered essential to promote or secure the common interests of the city, and for such purposes to borrow any sum of money for any term of time. It is difficult to conceive a more absolute grant of power, or one that would more completely subject the whole property of the city to the wild and reckless schemes of the city council, for fancied improvements. We therefore insist, as an original proposition, that it would be the duty of this Court, to hold said section 8 unconstitutional and void. But the question is not an open one in this Court. It has already been passed upon by the Supreme Court of the State of Wisconsin, which is the proper tribunal to determine its validity under the constitution of Wisconsin, and its decision, on this question, is conclusive upon this court.

Foster vs. the city of Kenosha, 12 Wis. 616.

This action was brought in the Circuit Court of Kenosha County, to enjoin the city of Kenosha from collecting a certain tax, levied upon real estate in said city, for the purpose of paying this identical scrip and the remainder of the same issue, and an injunction obtained, restraining its collection, and on appeal to the Supreme Court the judgment was affirmed on the ground that said section eight was void, as being in conflict with said section three of article 11, of the Constitution of Wisconsin. The sole question before the Court was the constitutionality or unconstitutionality of section eight ; and the Court were unanimous that it was unconstitutional and void, and so adjudged. This was the first adjudication of the Supreme Court on this question, and stands to-day as the final and settled judgment of said Court upon that subject. We therefore insist that said city of Kenosha had no authority to subscribe for stock in the Kenosha & Beloit Railroad Company, or to issue its

scrip in payment of said subscription or in aid of said Railroad Company.

It is true that the Court in their opinion, in that case say, "whether this would render the scrip of the city, issued in pursuance of that action of the Common Council, void or not, we will not attempt to determine in this proceeding."

That question was not then before them, and there was no necessity to say that the scrip was void. But the question that was before them was whether the tax that had been levied to pay that scrip was legal or void. And they declared it void on the sole ground that the city had no authority to issue the scrip or create the debt.

It was not declared void because improperly or irregularly issued, but solely upon the ground of a total want of authority to issue the scrip and make the debt. That decision was an express adjudication of the supreme tribunal of the State, that the City of Kenosha had no legal right or authority to make the debt, and as a necessary consequence had no power or authority to take any step to pay it. For municipal indebtedness can be paid only by taxation.

That decision declared and decided that there was a total want of power in the city to create this debt, and in such a case this Court have decided that the indebtedness of a municipal corporation is not valid. 3 Wallace 330.

That this scrip in its inception was void and must so be held in all Courts, results necessarily from the fact that there was no authority to issue it, and inasmuch as the Supreme Court of the State has already decided that there was no authority for its issue, we may safely rest on that decision as the law in this case on this question. The scrip having been issued and the debt incurred without authority of law, it necessarily follows that it is void and cannot be enforced unless by some subsequent process it has been ratified and legalized.

V.

"The construction given to a statute of a State by the highest judicial tribunal of such State, is regarded as a part of the statute, and is as binding upon the courts of the United States as the text."

Leffingwell vs. Warren, 2 Black, 603.
Shelby vs. Guy, 11 Wheaton, 337.
McCluny vs. Silliman, 3 Peters, 270.
Greene vs. Neil's lessee, 6 Peters, 291.
Ross vs. Duvall, 13 Peters, 45.
Massingall vs. Downs, 1 Howard, 767.
Nesmith vs. Sheldon, 1 Howard, 812.
Van Renslear vs. Kearney, 11 Howard, 297.
Webster vs. Cooper, 14 Howard, 504.

This case comes strictly within the above rule, which is the settled practice of this court. It is not a question of mercantile or commercial law, nor of impairing the obligations of contract, but simply a question of power and authority arising "on the construction of the constitution and statute law of the State of" Wisconsin. In such a case this court say, in Mercer County vs. Hackett, 3 Wallace, 96, "*We would have felt bound to follow it*," the decision of the State court.

This case is not within the decision in the case of Gelpcke vs. Dubuque, 1 Wallace, 175, for here the Supreme Court of Wisconsin has never changed its decision, but declared the law unconstitutional when it was first brought to its notice, and have always adhered to that decision. To hold that the decision in that case applied here, would entirely nullify all provisions of the State constitution which attempted to restrain the legislature from authorizing cities, towns or counties from running in debt. It is true that the city has assumed

to act under this law, and has issued this scrip. But the scrip shows on its face for what it was issued, and the provisions of the constitution and the law were notice to all the world, which they were bound to regard. The law was utterly void, as being in conflict with the constitution, and therefore no authority to the city, and the Supreme Court so held at the first opportunity. In the case last cited the court say: "where there is no defect of constitutional power, such legislation in cases like this is valid."

The converse of that proposition is also true, that where there is such defect of constitutional power, such legislation is invalid. The fact that the city council have acted under such invalid law and attempted to create a debt against the city, does not make it valid as to such debt, but it is void *in toto* and for all purposes. Otherwise the constitution is no protection, and it may be violated with impunity, and a debt contracted by a municipal corporation under an unconstitutional law, which was no authority for contracting it, if done before the Supreme Court of the State adjudged it void, is equally binding upon the corporation as it would have been had the law been constitutional and valid. In other words, the law would be constitutional for that purpose, but void for all others. This cannot be the true construction of the matter. The law must be held void for all purposes, and the action under it without authority, the same as if no law had existed. So the highest tribunal of the State has adjudged, and we claim that its decision on the validity of this law is conclusive upon this court.

VI.

These bonds have never been ratified, confirmed or legalized so as to become a legal and binding indebtedness against the City of Kenosha. The city could not ratify, confirm or legalize them without legislative authority.

If the City Council had no authority to make the subscription to the capital stock of the Kenosha and Beloit Railroad Company, or to issue its scrip in payment thereof, or in aid of said Railroad, then no subsequent act of said Council could ratify and confirm said action so as to make it valid and binding against the City, for the reason that there was an equal want of power or authority to ratify, as there was to act in the first instance.

On the trial of this cause in the Court below, the plaintiff introduced evidence with a view to prove a ratification; all of which should have been excluded on the ground that the City had no power to ratify or confirm said action. Such exclusion would have been correct, for manifestly if the City had no power to act originally, it could not, by ratifying or confirming, make its former action valid—for the same reason, want of power. To hold otherwise would be to say, that the City Council could accomplish indirectly what it was totally without power to do by any direct action. We shall, therefore inquire whether the City Council ever had any valid power from the Legislature to ratify their action in this particular and if so has it used it?

We deny that such ratification could have been made by the City Council even had the Legislature attempted to have conferred upon the city any such power. They could not make valid what was before void and of no binding force; a direct vote of the people alone could accomplish it.

Rochester vs. Alfred Bank, 13 Wis., 432.

But waiving this objection, let us inquire whether any such authority was ever attempted to be given by the Legislature. We can find no such authority.

Several acts of the Legislature were introduced under the pretence of showing that this scrip and indebtedness had been so ratified by the Legislature, but we are wholly unable to discover any bearing they have on the question; but as they have been given in evidence we propose briefly to refer to them.

The only Acts introduced by the plaintiff from which ratification is claimed, were Chapter 148 of the Laws of 1859 the provisions of the Charter of 1857 relative to a Railroad missioner. And the two Acts relating to the re-adjustment City debt of the City of Kenosha, passed in 1862 and particularly referred to in the stating part of this brief.

These are the only Acts of the Legislature introduced trial or relied upon to establish a ratification. It is pretended that they directly or in terms ratify this issue of stock, or the issue of this scrip, and we are therefore sider whether they do it by implication or whether by utter perversion of their true scope and object to give

to act under this law, and has issued this scrip. But the scrip shows on its face for what it was issued, and the provisions of the constitution and the law were notice to all the world, which they were bound to regard. The law was utterly void, as being in conflict with the constitution, and therefore no authority to the city, and the Supreme Court so held at the first opportunity. In the case last cited the court say: "where there is no defect of constitutional power, such legislation in cases like this is valid."

The converse of that proposition is also true, that where there is such defect of constitutional power, such legislation is invalid. The fact that the city council have acted under such invalid law and attempted to create a debt against the city, does not make it valid as to such debt, but it is void *in toto* and for all purposes. Otherwise the constitution is no protection, and it may be violated with impunity, and a debt contracted by a municipal corporation under an unconstitutional law, which was no authority for contracting it, if done before the Supreme Court of the State adjudged it void, is equally binding upon the corporation as it would have been had the law been constitutional and valid. In other words, the law would be constitutional for that purpose, but void for all others. This cannot be the true construction of the matter. The law must be held void for all purposes, and the action under it without authority, the same as if no law had existed. So the highest tribunal of the State has adjudged, and we claim that its decision on the validity of this law is conclusive upon this court.

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We deny that such ratification could have been made by the City Council even had the Legislature attempted to have conferred upon the city any such power. They could not make valid what was before void and of no binding force; a direct vote of the people alone could accomplish it.

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The only Acts introduced by the plaintiff from which a ratification is claimed, were Chapter 148 of the Laws of 1859, amending the provisions of the Charter of 1857 relative to a Railroad Commissioner. And the two Acts relating to the re-adjustment of the City debt of the City of Kenosha, passed in 1862 and 1863, and particularly referred to in the stating part of this brief.

These are the only Acts of the Legislature introduced on the trial or relied upon to establish a ratification. It will not be pretended that they directly or in terms ratify this subscription of stock, or the issue of this scrip, and we are therefore to consider whether they do it by implication or whether it is not an utter perversion of their true scope and object to give them any

such construction. If there was a legitimate object for which a Railroad Commissioner could be elected in the City of Kenosha, aside from this subscription and scrip, then certainly a law providing for the officer and the election of such officer should not be construed as a ratification of another transaction wholly unwarranted and void. If there was a legal and proper object for which such officer could be provided, we are bound to presume that it was to subserve that object, and not to ratify an illegitimate one that such office was created. In such case no implication would arise in favor of such ratification.

The City of Kenosha acquired a legal and proper interest to the extent of $150,000, in that railroad in 1853. That the City subsequently issued its scrip in payment of the interest on said bonds issued for that intent and other purposes to the extent of over $80,000. All of which was outstanding at the time of the creation of this office of Railroad Commissioner, and all of which the railroad company had agreed to pay—having been issued by way of loan.

We therefore find that all the duties of this Railroad Commissioner were properly applicable to the legitimate interests and indebtedness of the city, and hence no reasonable presumption or implication can arise that it was the intention of the Legislature in creating that officer of the city in electing him to ratify or legitimatize any scrip or other transaction of the City Council, which was then illegal and void.

But we may well inquire, is it competent for the Legislature to ratify and confirm a bond or piece of scrip which is utterly void? Supposing the Legislature had by express terms declared a contract before void in full force, would such act without any action or consent on the part of the contracting parties make valid and binding what was before void? Such is not the doctrine in Wisconsin.

Hasbrouck vs. Milwaukee, 13 Wis., 37.

But the Legislature have taken no such action directly or indirectly and neither has the city.

In order to ratify, the Court must find that it was the intention of the Legislature to give the authority, and then that the city acting upon that authority intended to ratify the issue of this scrip. Is there any such proof? Can this Court find such intention? The pretence that every Act passed by the Legislature in relation to the

City of Kenosha, or even in relation to the railroad, is to be construed as a grant of power to the defendant to ratify this illegal scrip or as an actual ratification of it, is simply ridiculous. Or that such ratification could be accomplished without any Act of the city for that purpose, is monstrous.

There is a total want of legislative action on the subject of ratification, and an equal want of co-operation on the part of the defendant. It is therefore useless to pretend that this scrip has ever been ratified either by the Legislature or the City.

Our defence to this action is not an attempt to show that a valid power or authority granted by the Legislature to the City of Kenosha, has been defectively or improperly executed, but on the contrary we have demonstrated, in the language of the Supreme Court of the United States, in Mercer County vs. Hackett, "that no law existed to authorize" the making of this subscription or the issue of this scrip.

We therefore insist, that there was no authority or power in the city council, to make the subscription to this stock, or to issue the orders or scrip of the city in payment thereof, or in aid of said Kenosha & Beloit Railroad Company, and that the several changes of the scrip which were made, have not changed its character or effect; that it was entirely void in its inception, and so remains in its changed character; and that the plaintiff was not a *bona fide* innocent holder thereof, inasmuch as the scrip on its face states its character; and there was no law, which, under any circumstances, authorized said city to issue said scrip. The plaintiff was therefore bound to take notice that the same was unauthorized and void, and the judgment of the Court below should be reversed.

JOHN W. CARY,
Counsel for Plaintiff in Error.

Second Case

SUPREME COURT

OF THE

UNITED STATES.

NO. 143. DECEMBER TERM, 1869.

THE CITY OF KENOSHA, *Plaintiff in Error*,

vs.

JOSHUA F. LAMPSON, *Defendant in Error.*

This writ of error is prosecuted to reverse a judgment of $16,109.30 recovered by the defendant in error, on coupons from bonds purporting to have been issued by the City of Kenosha, in aid of the Kenosha and Rockford Railroad Company.

The bonds were of the same series and issue mentioned in No. 142 of this term. And the bill of exceptions in this case is a copy of the bill of exceptions in said case, except that in this case, five hundred and sixteen coupons were offered and given in evidence, being the coupons on the same forty three bonds therein mentioned, maturing in the years 1862, 1863, 1864, 1865, 1866 and 1867.

The declaration is the common counts in assumpsit, with a notice that said coupons would be given in evidence.

The plea is *non assumpsit.* The points made in the brief No. 142, excepting the first and second points, are applicable to this case, and the argument made in that case is here again repeated, and the same benefit thereof claimed as if repeated at length.

Mr Burr

II.

The coupons do not express or import a consideration, and none was proven. It is therefore insisted that they are *nude pact*, and could not support a recovery thereon.

The bonds were not introduced in evidence. No proof of any kind was made that any such bonds had ever in fact been issued, except the coupons themselves. No proceedings of the city council were proved. But one of the bonds, No. 127, from which said coupons were taken was introduced. Record, pp. 24 to 30.

The coupons were received under defendant's objection, and of the five hundred and sixteen coupons so given in evidence, only twelve were taken from said bond No. 127. And as to all the rest and residue of said coupons, there was an entire failure of proof to show that any such bonds had ever been issued by the city of Kenosha, or if issued, that they were so issued in pursuance of an ordinance; nor whether said ordinance, if passed, specified the amount of said loan, or that it was approved by a vote of the free-holders of said city. Nor was there any proof that such pretended bonds even purported on their face to have been so issued as provided in said section 4 of chapter 6 of chapter 133 of the laws of 1857. The coupons did not prove the existence of the bonds, and their being could not be presumed. Neither can the Court, without proof of the action of the City or the production of the bonds, presume that the steps were taken by the City, required by the law, to authorize their issue, for the coupons do not on their face purport to have been issued in pursuance of any law.

III.

That the provisions of section 4 of chapter 6 of chapter 133 of the laws of 1857, are flagrantly in violation of the 3d section of article 11 of the constitution, is manifest to every one and cannot be doubted.

That it is an injunction to the legislature is true, and in some sense directory to them may be admitted.

It is not disputed either that the Legislature may take a very wide range in their discretion in restricting, and still their proceedings might not be so repugnant to the Constitution as to enable the Court to declare thier action void, as contrary to the Constitution. They might act very indiscreetly and unwisely in the matter, and still it could be claimed that they were within the discretion vested in them by this provision, and the Courts could not properly hold their action void.

Again the Legislature might neglect to act at all in the matter of restricting the power of the municipalities in this respect, and their zefusal to act, although a plain violation ot the duty enjoined upon them by this provision, still it might not present a case in which a Court of law could act to declare their proceedings void, for the simple reason that they had neglected to act at all.

But such is not the case now before us. It is not alleged that they have acted indiscreetly or unwisely in restricting the power of this municipality, for *taxation, assessment, borrowing money, contracting debts and loaning its credit*, or that it has refused to act at all under said provisions, but that in open defiance of said provisions of the Constitution, it has affirmatively authorized it, for any purpose other than such as is specially provided for in the charter, *to levy and collect special taxes, or to borrow on the corporate credit of the City any sum of money for any term of time, at any rate of interest, and payable at any place deemed expedient.*

This is an affirmative grant of power directly in conflict with the express provisions of the Constitution—it is not an indiscreet and unwise exercise of powers conferred, or a failure to act as enjoined, but an open and plain violation of express terms of the Constitution, which this Court is now asked to sustain and enforce.

All legitimate and proper municipal expenditures are otherwise provided for in said act, and this power is only given for purposes outside of such matters, and expressly disregards and annuls this provision of the Constitution, and when the Courts are called upon

to enforce it, they are bound by the Constitution, and must give it effect, It is, therefore, insisted as an original question, that this Court are bound to hold it repugnant to the Constitution.

We insist, however, that it is not an open question in this Court, but that the decision in the case of Foster vs. Kenosha, in 12 Wis. is conclusive upon this Court.

JOHN W. CARY,
Counsel for Plaintiff in Error.

Supreme Court--United States.

No. **Dec. Term 1869.**

THE CITY OF KENOSHA,

Plaintiff in Error,

vs.

JOSHUA F. LAMSON,

Defendant in Error:

BRIEF FOR DEFENDANT IN ERROR.

MATT. H. CARPENTER,

of Counsel.

J. H. YEWDALE, Law Printer, Milwaukee.

SUPREME COURT OF THE UNITED STATES.

No. *Dec. Term*, 1869.

THE CITY OF KENOSHA,
Plf. in Error.
vs.
JOSHUA F. LAMSON.

ACTION OF DEBT.

No. *Dec. Term*, 1869.

THE CITY OF KENOSHA,
Plf. in Error.
vs,
JOSHUA F. LAMSON.

ACTION OF ASSUMPSIT.

Both these cases involve substantially the same questions, and may conviently be briefed together.

Both actions are founded upon bonds issued by the City of Kenosha, in aid of the Kenosha & Rockford Railroad Company, dated September 1, 1857. The action of debt was founded on the bonds, to recover the amount of

interest specified in coupons over six years past due, when suit brought; and the action of assumpsit was founded on coupons from same bonds which had matured less than six years before suit brought. The great question in both cases, is, *the validity of the bonds*; or in other words, the power of the city to issue the bonds.

Chapter 60, private laws of Wisconsin, 1853, incorporates "The Kenosha & Beloit Railroad Company;" Chapter 22, private laws, 1857, changes the corporate name to the "Kenosha & Rockford Railroad Company," and authorizes a change of route from that fixed in the original charter. *Record* 87.

Chapter 133, private laws, 1857, amends the city charter and consolidates the several acts relating thereto. This act provides as follows:

Section 4, chapter 6, of chapter 133:

"For any purpose, aside from what is otherwise spe-
"cially provided for in this charter, the common council
"shall have power to levy and collect special taxes, &c.
" * * *or the common council may borrow on the corpo-*
"rate credit of the city, any sum of money for any term of
"time, at any rate of interest, and payable at any place deemed
"expedient, issuing bonds or scrip therefor: Provided that no
"such tax shall be levied, or money borrowed, except as
"shall be provided by ordinance, which ordinance, shall
"in each case specify the amount of such tax or loan, and
"all other essential particulars relating thereto, *and be*
"approved by a majority of the voters of the city, possessed
"of a freehold estate or occupying lots upon which they pay
"the taxes, voting at a special election, which may be called
"for that purpose."

Chapter 12, of said Chapter 133, provides as follows:

"*Of Railroad Commissioners.*"

"Section 1. The Railroad Commissioner shall be ex-officio a member of the Board of Directors of the Kenosha & Beloit Railroad Company, with all the duties, responsibilities and powers incident to the office of directors under the charter of said railroad company.

"Sec. 2. It shall be the duty of said Commissioner to attend to all meetings of the stockholders of the Kenosha Railroad Company, and to vote in person the same as any individual stockholder in all shares of stock held by the city of Kenosha in the stock of said company.

"Sec. 3. The Railroad Commissioner shall have generally the charge and control of all interest the city of Kenosha now has *or may hereafter have* in the Kenosha & Beloit Railroad. He shall receive all funds paid into the hands of the City Treasurer on account of the tax for the benefit of the Kenosha & Beloit Railroad Company, and shall hereafter redeem all scrip which has been issued to said railroad company as the same becomes due, making such provisions therefor, or recommending such measures to the Common Council as he may deem necessary for the protection and benefit of the taxpayers of the city."

These acts were in force when the bonds were issued.

I.

Aside from the Constitution of Wisconsin the following points are clearly established by the adjudications of the Supreme Court of the United States, and are conclusive of the plaintiff's right to recover :

1. The issue of bonds in aid of a railroad running to a city is for a municipal purpose.

Rogers v. Burlington, 3 *Wallace* 665.

Meyer v. Muscatine, 1 *Wallace* 384.

2. The charter therefore gave sufficient authority to loan the credit of the city and give bonds.

See Charter above quoted.

3. Where the power exists to issue the bonds, under certain limitations and in certain contingencies, a municipal corporation, which has issued the bonds, *is estopped to deny*, as against a bona-fide holder, *that the power was properly exercised.*

Gelpcke v. Dubuque, 1 *Wallace*, 203.

Cases cited in note.

II.

But it is objected that the provision of the charter above quoted, and, which if valid, authorized the issuance of these bonds, is in conflict with the Constitution of Wisconsin, and consequently null and void. It is necessary, therefore, to consider this objection:

Our Constitution, Art. XI., Sec. 3, provides—

" *It shall be the duty of the Legislature*, and they are here-
" by empowered to provide for the organization of cities

" and incorporated villages, and to *restrict their power* of " taxation, assessment, borrowing money, contracting " debts, and loaning their credit, *so as to prevent abuses* in " assessments and taxation, and in *contracting debts* by " such municipal corporations."

The restriction, which it is made the duty of the Legislature to impose, is not upon the *amount* of the indebtedness, but upon *the power to contract any indebtedness whatever.* They shall " restrict *their power*," *so as to prevent abuses in contracting debts.* Whether a particular indebtedness be an abuse of the power, is rather to be determined by its object than by its amount. A thousand dollars improperly contracted, is as clearly an abuse of the power, as a hundred thousand; and may be *an abuse* of the power, while a hundred thousand dollars wisely contracted or incurred, might be *a perfectly proper* exercise of this power. And I shall show that *at the time these bonds were issued*, such was the rule of decision in the Supreme Court of our State.

This precise question came before the Supreme Court in *Dean v. Madison*, 7 *Wis.*, 688. The charter of the city (Pr. Laws 1856, chap. 75) provided that the common council should have " The control and management of " the finances and of all property of the city * * " shall have power to pass ordinances, &c., for the benefit " of *trade, commerce* and *health*, and subdivision 12 of same section provided that the common council should have power " to establish and regulate boards of health, *provide hospitals and cemetary grounds*, regulate the burial of the dead," &c.; but there was no limitation fixed upon the amount of debt which they might incur for any *or all*

of their purposes. The city under this charter, contracted a debt and issued its bonds ; and the question before the court was upon the validity of the bonds.

The court, after disposing of other objections to their validity, say:

" By another provision of the Constitution, Sec. 3, Art. " 11, it is made the duty of the legislature to provide " for the organization of cities, and to restrict their pow- " er of taxation, assessment, borrowing money, and con- " tracting debts, &c. *We cannot discover that the legisla- " ture restricted in the charter the power of the Common Coun- " cil to contract debts, and some provisions of the charter ob- " viously contemplate that debts will be contracted against the " city.* WE THEREFORE CONCLUDE THAT THE TEN THOUSAND DOL- " LAR INDEBTEDNESS, CONTRACTED BY THE CITY TO PURCHASE CEM- " ETARY GROUNDS IS FREE FROM ALL CONSTITUTIONAL OBJECTION."

Here the precise ground upon which the bonds are held valid is that the legislature had authorized the city to contract debts, and HAD NOT *restricted the power* of the Common Council to contract debts.

This decission therefore rested upon either one or the other, possibly both, of the following theories.

1. That the restriction which the constitution required, related to the *purpose* not the *amount* of the indebtedness; or,

2. That the constitution imposed this duty upon the legislature, and was directory in its character, so that whether the legislature performed it or not the courts could not interfere.

Upon which of these premises the decision rested is immaterial to our purpose; because upon either, our

bonds are valid. It is certain that the court held the bonds valid *upon the ground* that the Legislature had given to the city power to contract debts *for the purpose of a cemetery* and had imposed no restrictions upon that power. This decision was made in 1859.

The same question came again before that court in *Clark v. Janesville*, 10 *Wis.* 136.

The City Charter of Janesville provided :

" The Common Council of said city shall have power " to submit to the legal voters thereof, the question " whether said city shall take stock in *any* railroad run- " ning to or passing through said city, by giving in some " newspaper published in said city, at least ten days " notice of the time and place of deciding said question ; " *and stating in such notice* THE AMOUNT *to be subscribed.*"

Here, it will be noticed was no limitation fixed by the charter upon *the amount* which might be subscribed, and if the bonds in this suit are void for that reason, so were the Janesville bonds, for the same reason—Cole Justice, says :

" In conferring upon the Common Council of Janes " ville power by resolution to authorize the Mayor to " subscribe stock for any railroad running to or passing " through the city, the Legislature undoubtedly supposed " that the *limitations upon this power contained in the Char-* " *ter would effectually prevent any abuse in its exercise. The* " *Common Council in the first instance had to submit to the* " *legal voters of the city the question whether the city should* " *take stock*; giving at least ten days notice, in some " newspaper published in the city, of the time and place " of voting upon the question, stating the amount to be

" subscribed, &c *The election was to be* by ballot, and if " a majority of the votes cast upon the question was in " favor of taking the stock, the Common Council by " a resolution which was required to be entered upon " the city records, could authorize the Mayor to subscribe " for the city the amount of stock so voted to be taken. " And as the concurrent action of the city authorities, " and people, was necessary to authorize the subscription, " it was but fair to suppose that no abuse would follow " from conferring this power upon the corporation. *The* " *power to take the stock was subject to the will of the people* " *directly affected by the indebtedness and* THIS WAS ALL THE " RESTRICTION *the Legislature deemed necessary to impose upon* " *its exercise in the present instance.*"

There is nothing in the opinion of the majority in conflict with this opinion of Mr. Justice Cole. Indeed the whole court concurred in overuling all objections to the validity of the bonds, except that the majority held that the act authorizing the issue of the bonds was a *general law* within the meaning of our constitution, and not having been published, was not in force when the bonds were issued. Paine, J. delivering the opinion of the majority, held that the building of a railroad through a city was a municipal purpose ; and proceeds : " I have " thus referred to the objections to the validity of these " bonds, *with one exception* ; and were these the only ob- " jections, *I should be prepared without any doubt on the sub-* " *ject to affirm the judgment.*" He then proceeds to the objection that the act was a general law, and on that ground held the bonds invalid, and Cole J. dissented on that point, *holding the bonds good against all objec-*

tions. The whole Court therefore concurred in holding with Justice Cole, that the bonds were not void because no limitation was fixed upon the *amount* which might, under the charter, be subscribed for railroad purposes; and that the grant of power in that case would have been perfectly valid, if the act had been published before the election was held and the bonds issued. The only disagreement was, that Cole, Justice, held the bonds valid notwithstanding that objection, and the other judges held them void *for that reason only.* This decision was made *in January*, 1860,

From these decisions it is evident, that in 1857, when these bonds were issued, and in 1860, three years afterwards, the grant of power contained in the Kenosha charter would have been held constitutional, and the bonds issued under it valid.

But two volumes later in the Wisconsin series, is found the case of *Foster vs. Kenosha*, 12 *Wisconsin*, 616, directly opposed to the principle of these cases in the 7th and 10th Wisconsin Reports. The Court hold the bonds void, for the very reason that in *Dean vs. Madison*, they held them valid; that is, because the legislature *had not limited* the amount of debt to be contracted. These bonds, when made in September, 1857, were perfectly valid upon the authority of *Dean vs. Madison*, 7 *Wis.* and *Clark vs. Janesville*, 10 *Wis.*; were circulating in market and passing from hand to hand, with the full sanction of our Supreme Court, until the decision in *Foster v. Kenosha*; and henceforth they were not worth the same amount of blank paper, in the State court.

We have seen that the whole court in *Dean v. Madison* held the bonds good upon the express ground that the Legislature *had not* restricted the power of the city to contract debts; and that Cole, Justice, in Clark v. Janesville, delivered his opinion, (which upon that point was concurred in by all the court, composed of the same judges who decided the case of Foster v. Kenosha) to the effect that inasmuch as "the concurrent action of the city authorities and people was necessary to authorize the subscription," it was fair to suppose that no abuses would follow; and that the fact that "the power to take the stock was subject to the will of the people directly affected by the indebtedness, "WAS ALL THE RESTRICTION the Legislature deemed necessary to impose upon its exercise;" therefore the bonds were valid. Yet in Foster vs. Kenosha, Justice Cole, says: "Nor do we consider it a suffi- "cient answer to this objection, to say that the Legisla- "ture properly restricted the power of the corporation "to levy taxes and contract debts, WHEN they PROVIDED "that no tax should be levied, or money borrowed under "Section 8, unless a majority of the votes should be in "favor of levying the tax or making the loan. *For in "the latter case the restriction would be one imposed rather by "the people than the Legislature.*"

Dean v. Madison, 7 Wisconsin:

> The bonds are valid *because* the Legislature *had not* restricted the power.

Clark v. Janesville, 10 Wisconsin:

> The bonds are valid—so far as regards this ob-objection—because the Legislature had imposed the restriction of *a popular vote.*

Foster v. Kenosha, 12 Wisconsin :

The imposition of a popular vote is no restriction whatever, *and the bonds are absolutely void.*

III.

The decision of *Foster v. Kenosha.* 12 Wis., is not to be followed by this court for two sufficient adjudicated reasons :

(1.) It was pronounced after these bonds were issued, and totally reverses the rule of decision upon this subject, existing in the courts of the state, at the time the bonds were issued.

Gelpecke v. Dubuque, 1 *Wallace*, 175.
Ohio Trust Co. v. Debolt, 16 *How.* 432.
Havemyer v. Iowa County, 3 *Wallace*, 294.

(2) The decisions of the Supreme Court of the State being inconsistent, this court is at liberty to adopt either rule; Pease v. Peck, 18 How. 595. And the principle of Foster v Kenosha, is wholly untenable.

The constitution, in the article in question, is addressed solely to the legislature. "It shall be *the duty of* "*the legislature*, and they are hereby empowered, to pro- "vide for the organization of cities and villages, and to "restrict their power," &c., &c.

But suppose the legislature provide for the organization of a city, *and do not* restrict their power, the question is, *what is the consequence ?*

There are two views, either one of which may be supported by a respectable argument : (1.) That the pro-

vision is merely directory to the legislature, imposing a duty upon them which they cannot concientiously disregard; but if they do the courts are powerless in the premises; the only consequence being that the legislators are amenable to popular sensure; or, (2.) That the provision in question is *in the nature of a limitation* upon the power to provide for the organization of cities; in which case, an act of the legislature incorporating a city, *but not making the necessary restriction, would be absolutely void.* To concede that a particular act of incorporation is valid and effectual to create an organization, is to surrender the whole ground, and admit that the provision in the Constitution is merely directory to the legislature. *Foster vs. Kenosha,* is remarkable for steering between these two conclusions, one of which must be true and the other false, and neither entirely adopting nor rejecting either. The Court say: "*It was intended* that the legislature *should* " *not give this authority* without restricting it so as to pre- " vent abuse and oppression. This evidently was the ob- " ject and design of the constitutional provision." Then the court, as if in despair, ask: "Now can the Legislature disregard it entirely." Then the Court proceed "To pre- " vent all misapprehension, however, we will say that " we do not suppose an act of the Legislature creating a " municipal corporation, *but imposing no restriction* upon " the power of such corporation to levy taxes and borrow " money, would necessarily be void for that reason. In " such a case the city authorsties would only have power " to levy taxes and raise money to support the local " government, AND FOR PROPER MUNICIPAL PURPOSES."

The doctrine of this decision is, that a city incorporated by an act containing *no restrictions whatever*, is nevertheless a good organization, and may raise money for "*proper municipal purposes.*" Very well. Now turn to the opinion of the majority of the Court. 10 Wis. 176, and read the language of Mr. Justice Paine: "But I "think there is great force in the reasoning of those "who hold that the general welfare, and commercial "prosperity of cities, are so materially advanced by con- "necting themselves with one of these great arteries of "trade and travel, as to make their construction *a ligiti-* "*mate object of municipal enterprise.*" Now turn to page 185 and read: Dixon, C. J.: "*I fully concur* with my brother "Paine."

Now put *this* and *that* together; a city created by act giving it unrestricted poweres of taxation, is a good city and may levy taxes and raise money "*for proper municipal purposes,*" *Foster vs. Kenosha*, 12 Wis. 623; and the construction of a railroad leading to a city, "*is a ligitimate* "*object of municipal enterprise,*" Clark vs. Janesville, 10 Wis. 176.

Then our bonds are good.

The true principle is believed to be this. The provision in question is addressed solely to the Legislature. It is made their duty to restrict the power of a city which it creates so as to prevent abuses. This is necessarily a subject of legislative discretion. The Legislature must determine *what* are abuses to be prevented and what restrictions *are* necessary to secure this end. When the Legislature has imposed one restriction, for instance a popular vote on the question, the courts cannot take up

the subject and impose another. To cancede this power to the courts, would be to transfer the duty and power of determining what is a necessary or sufficient restriction, from the Legislature, where the Constitution has placed it, to the courts where the Constitution has not placed it. And when our Supreme Court say in *Foster v. Kenosha*, that subjecting the exercise of this power to the test of a popular vote is no restriction whatever, they contradict their own decision in *Clark v. Janesville*, as I have shown by quotation. When the Legislature have imposed one restriction, and have omitted all others, that is a legislative declaration that the one imposed is sufficient, and that others ought not to be imposed.

Mr. Webster, arguing in Gibbon v. Ogden, 9 Wheat., 18, that Congress had exhausted the power to regulate commerce, by the laws it had passed, says: "All useful "regulation does not consist in restraint; and that which "Congress sees fit to leave free, *is a part of its regulation*, "as much as the rest. Congress has acted on this power; "it has done all that it deemed wise; and are the states "now to do whatever Congress has left undone? Con- "gress makes such rules as, in its judgment, the case re- "quires; and those rules, whatever they are, constitute the "system." Chief Justice Marshall states the argument in these words: "It has been contended * * that "regulation is designed for the entire result applying to "those parts which remain as they were, as well as to "those which are altered. It produces a uniform whole, "which is as much disturbed and deranged by changing "what the regulating power designs to leave untouched, "as that on which it has operated," and he adds: "There

" is great force in this argument, and *the Court is not* " *satisfied that it has been refuted.*" This language is strictly applicable here. *The Legislature is to impose* the necessary restraints. Then, necessarily, the Legislature must determine *what restraints are necessary.* In the Kenosha charter, it imposed the same restraint, the popular vote, which in *Clark v. Janesville* was held sufficient, and whatever the courts may at present think of the wisdom or sufficiency of that restraint alone, they cannot add others; nor declare the act void because it has not added those which the Legislature must be presumed to have deemed *unnecessary or pernicious.*

The reasoning and philosophy of the decision of *Luther v. Borden,* 7 *Howard* 1, is directly applicable here, and conclusive against the doctrine of *Foster v. Kenosha.* As the Constitution had made it the duty of Congress to guarantee a republican form of government to every state, it was held that Congress must "necessarily decide " what government is established in the state before it " can determine *whether it is* republican or not." And as the law had made it the duty of the President to interfere and suppress an insurrection against the government of the state, it was held that the " President must, of " necessity decide which is the government, and which " party is unlawfully arrayed against it, before he can " perform the duty imposed upon him by the act of con- " gress." And it was declared that the courts were bound by the decision of Congress in one case and of the President in the other.

So, in this case, the duty of organizing cities and imposing such restraints upon their power of contracting

dobts as to prevent abuse, is by the Constitution imposed upon the Legislature. The Legislature must of necessity determine what restraints are necessary to secure this end ; and the courts must be bound by their determination. What they have left free must be presumed to have been decided by them to be unnecessary. Restriction may be either in regard to the subject for which indebtedness may be contracted, or as to the amount, or the city may be restricted by being compelled to submit the question to a popular vote. When the Legislature has determined that the restriction of popular confirmation shall be required, the court cannot add a restriction as to the amount, or hold the law void because in the opinion of the court, this additional restriction ought to have been imposed by the Legislature.

But fortunately we are not left to a mere argument founded on the analogy of this case to those above quoted. The provision of our Constitution, in question, is a transcript of the New York Constitution. This question came before the Court of Appeals *in Bank of Rome v. Rome*, 18 *N. Y.* 38; and that court after quoting the section of the Constitution identical with ours, say:

" Now from this provision it is plain that the conven-
" tion thought that there might be and had been abuses
" in respect to the exercise of the named powers of muni-
" cipal corporations. They therefore enjoined upon the
" Legislature the task of restricting those powers so as to
" prevent the abuse. But it is manifest from the terms
" of the provision, that these powers were, in some cases
" at least, and to some extent, still to exist; for the direc-
" tion is neither to abrogate existing powers, nor to ab-

" stain from creating new ones, but only to restrict them " so as to prevent abuses in assessments and contracting " debts. Indefinite as is the rule of restriction prescribed " by these provisions and ill suited in its terms to be judi- " cially applied, it is still both salutory and well suited " to be the guide of legislative discretion. It presents " to the Legislature the general object to be attained, the " prevention of abuses in assessments and contracting " debts, and the general means of attaining that object, " by restrictions on the power to be conferred on " municipal corporations; but it leaves to the discre- " tionary power of that body the determination of " what are abuses, and what extent of restriction, on " the powers to tax, to lay assessments, to bor- " row, to contract debts, to loan credit, will " prevent such abuses. The legislative judgment is ap- " pealed to, and is to be formed while they are deliber- " ating upon the enactment of the law. Each particular " case is to be determined on its own circumstances, as " to the measure of restriction, necessary to secure the " end proposed. Restrictions which, as to one munici- " pality would suffice, as to another might be altogether " insufficient. To each case they are to apply a limit of " power which will *in their judyment* prevent abuse. If " their judgment has been in any particular case errone- " ous, if the limit which they deem sufficient has proved " not narrow enough to exclude abuses, *surely their judg- " ment is not to be reviewed and reversed in a Court of law. " The rule is general, that a discretion committed to one au- " thority is not to be reviewed by another. * * I conclude " therefore that the provision in question does not set forth any*

" *rule by which a court can adjudge an act of the Legislature*
" *to be void. This rule was intended to operate upon the con-*
" *science and judgment of the Legislature in passing laws, and*
" *we must assume that the law in question was enacted by them*
" *in view of it,* and of all the responsibilities which it im-
" posed, and that in the Legislative judgment this act did
" so restrict the powers in question as to prevent abuse.

This was a unanimous opinion.

To the same effect see

Grant v. Courter, 24 Barb., 232.
Moers v. Reading, 21 Penn., 189.
Railroad v. Clinton Co., 21 Ohio, 77.

Upon no other principle can the decision of our Supreme Court in *Dean v. Madison,* be vindicated. There the court say that the bonds are valid, *because* the legislature has imposed *no restriction.*

It is a commonly entertained, but most erroneous opinion, in this country, that the *residum* of sovereignty is vested in the courts. There are many instances in which if the legislature refuse to do their duty, provisions of the Constitution *will remain* "*a dead letter*"; but the courts are powerless to redress the wrong. If the legislature will not elect a Senator to Congress, the courts cannot elect one, nor by *mandamus* compel them to do so. The Constitution made it the duty of the legislature to exempt a reasonable amount of property from forced sale on execution. Suppose the legislature had never performed this duty ; could the courts have decided what should be exempt ; or could the courts have refused to issue executions on judgments rendered ? If the legislature will not do its duty, the people can correct the evil at the ballot

box, the courts cannot. This broad distinction is to be observed ; when the legislature passes an act it has no power to pass, the courts may declare it void. When the legislature merely omits its duty, no remedy can be had in the Courts. The only ground upon which the Court could interfere, with a city charter which made no restrictons, would be to hold that *the legislature had no power to incorporate a city without some restrictions* ; and then the result would be that the act of incorportion, thus defective, would be a nullity ; and the organization of a city under it utterly void. But the Court in *Foster v. Kenosha* admits the act of incorporation, in such case, to be valid ; concedes the power of a city created by such law to raise money "*for proper municipal purposes.*" If under a grant of power which is not at all restricted, the city may raise money for "proper municipal purposes," then surely it may raise money for any purpose which is municipal in its character and which the legislature might have authorized by specific enactment ; and aiding in the construction of a railroad has been held to be such a purpose, by all Courts in this Country.

IV.

Conceding the original invalidity of these bonds, upon the ground relied upon by the defendant, viz: the want of power in the city to issue them, because the power to contract indebtedness was not limited *in amount*; still it is manifest that after a particular amount of bonds had been issued, a ratification of *such bonds* by the Legislature,

would cure the defect; because such ratification of a *given amount of indebtedness*, would be equivalent to an original authority to issue *that amount*, which it is conceded would have been all right under our Constitution. And the Legislature has given this ratification over and over again.

Subsequent to the issuance of the bonds the name of "the Kenosha & Rockford Railroad Company" was changed to "the Kenosha, Rockford & Rock Island Railroad Company." *Record* 95.

Chapter 148, Pr. Laws 1859, provides, "The Common "Council of the City of Kenosha shall have generally the "charge and control of all interest the City of Kenosha "*now has*, OR MAY HEREAFTER HAVE in the Kenosha, Rock- "ford & Rock Island Railroad." *Record* 88–89.

The act then provides that the Common Council shall appoint the Railroad Commissioner, that when duly appointed he shall be *ex-officio* a member of the board of directors of the Kenosha, Rockford & Rock Island Railroad.

Chap. 151, *Pr. Laws* 1862, authorizes the city "to issue "new bonds, in exchange for the bonds and scrip *hereto-* "*fore* issued by said city, on harbor and railroad account, "now outstanding and unredeemed, or for the judgments "heretofore rendered thereon for the purpose of com- "promising *the indebtedness* of said city on such terms as "may be agreed upon between the city and its *creditors*." *Record* 89.

Chap. 114, *Pr. Laws* 1863, contains the same provision, though it varies the details of the plan of re-adjustment and repeals the former law. *Record* 93.

These acts amount to a ratification.

Shaw vs. Railroad Co., 5 *Gray*, 178.
Gelpecke vs. Dubuque, 1 *Wallace*, 220.
Morgan vs. Beloit, 7 *Wallace*, 619.

V.

Passing the question of the validity of the bonds and coupons; the defendant's counsel requested the court to instruct the jury as follows :

First. "That *the bonds* declared on, *as well* as the cou-
" pons which had been attached thereto, claimed to be
" due, should have been produced in evidence in order to
" sustain the declaration under the issue, and that there
" could be no recovery except for the amount of the
" coupons which belonged to said bond number 127."

This instruction was refused and the defendant excepted. *Record* 102.

One of this issue of bonds read in evidence; the coupons purported to be of same issue, but from bonds of different numbers, and the bond showed that there were $100,000 of these bonds issued by the city. *Record* 95.

The coupons from the bond read in evidence and the coupons purporting to be from the other bonds, were read in evidence in connection with the bonds; this was sufficient, at least was *prima facie* evidence, proper to go to the jury; and the verdict is conclusive.

VI.

THE STATUTE OF LIMITATIONS.

The last plea of the defendant in the action of debt sets up that the cause of action stated in certain enumerated counts of the declaration did not accrue to the plaintiff within six years next before the commencement of the suit. The plaintiff demurred to this plea, and the court sustained the demurrer.

The bonds were issued in 1857, and mature in 1877. This suit was upon *the bonds*, to recover the interest due to the time of suit brought. The declaration counts on the bonds, *not on the coupons.*

It is a general rule, admitting of no exception, so far as I know, that the statute of limitations does not apply to interest matured on a contract until the principal, or some installment of the principal, becomes due.

In Grafton Bank *vs.* Doe, 19 Vt., 463, the court say:

"It is true that the orators might have instituted their suit for the recovery of the year's interest; but they were not bound to do it. The statute does not begin to run upon the demand until the principal, or at least some separate and distinct portion of the principal, becomes due and payable, and then only upon such distinct and separate portion. The accruing interest from year to year is not thus separated from the principal demand; and consequently the statute of limitation does not run upon it until the principal is barred by the statute."

See, also, Henderson *vs.* Hamilton, 1 Hall, (N. Y.) 316.

But it is claimed by the plaintiff in error, that inasmuch as the interest reserved upon these bonds was also

secured by coupons, upon which suit might be brought, *therefore the coupon must be regarded as the only cause of action*, and the statute of limitations begins to run from the maturity of the coupon.

It is true that suit *may* be brought upon the coupon when it is in proper form of negotiable paper; but *it is not true* that the suit *must be founded upon the coupon.*

Suppose A owes B ten thousand dollars, to be paid one thousand dollars each year for ten years, for which A gives B a bond conditioned for such ten several payments, and also ten several promissory notes, payable one in each year for ten years, and the notes recite that they are duplicate promises or collateral to the bond. In such case the creditor, at the expiration of the first year, would have two securities for the one thousand dollars due him; one, the bond under seal, on which he might maintain debt; the other, the note, on which he might also maintain debt or assumpsit. And at the end of eight years the creditor could, if he pleased, bring debt on his bond, under seal, and not barred by the statute of limitations, to recover the eight matured instalments, although the first two of the series of notes given as duplicate or collateral security for the first two instalments would be barred by the statute. Where a creditor holds two or more collateral evidences of indebtedness he may enforce either, until he obtains one satisfaction.

The courts have repeatedly held that where a note which would be barred by the statute after six years is secured by a mortgage which is not barred until the expiration of twenty years, the creditor may foreclose his mortgage in equity by suit commenced, after six and

before twenty years, although he cannot sue at law on the note after the six years. The principle of law involved in these decisions is, that the creditor is entitled to such relief upon each security, as by law pertains to that security without regard to what may have happened to the other security; provided, of course that the creditor has not obtained upon either one satisfaction.

Now, what are the facts of this case? By the bond, which is set out in full, (Record, page 95) the city agrees to pay to the bearer the sum of five hundred dollars on the 1st day of September, 1877, "with interest at the rate of ten "per cent. per annum, payable semi-annually, upon pre- "sentation of the proper coupons, at the said Peoples' "Bank, for the said interest."

It is plain that upon such a bond, if the interest is not paid for one, two, five or ten years, *the holder of the bond* may have an action *upon the bond* and recover the amount of unpaid matured interest, *due according to the terms of the bond*, by surrendering into court the coupons to be cancelled; and this he may do at any time until the principal sum secured by the bond matures, and is itself barred by the statute of limitations applicable to bonds.

So far we presume our argument will be conceded. But it will be contended that the declaration shows that the *plaintiff is not the holder of the bond.* This is true and presents the only remaining question: Can the holder of the warrant maintain an action on the bond which he does not hold to recover the amount of interest to which he is entitled?

The plaintiff in debt on bond must make profert of the bond, or state such facts as excuses him from doing so. For

instance, the plaintiff may declare on a bond, and state that it has been destroyed by fire. This excuses him from making profert of the bond; and proof of its destruction on the trial will enable the plaintiff to recover on the bond. In case of a lost bond, not negotiable, the plaintiff may recover by averring and proving the loss. If the lost bond be negotiable, courts will require the plaintiff to file a sufficient bond to indemnify the defendant against the lost bond in the hands of a subsequent *bona fide* holder.

1 Chitty Pl., 365, 366,

It is not therefore necessary to the plaintiff's recovery on a bond that he should be the holder of the bond, or that it should even be in existence The philosophy of this rule is that the bond is only the *evidence* of the debt or duty owed by the defendant. The destruction of the bond, therefor, did not discharge that debt or duty ; and the plaintiff may still enforce the obligation, and establish it by the best secondary evidence. In case the bond be destroyed or lost, not being negotiable, the defendant is fully protected by paying the judgment; and if the bond be lost and be negotiable, the court will protect the defendant by requiring the plaintiff to give satisfactory bond of indemnity. Therefore, the principal of law may be stated thus: if the plaintiff is entitled to a sum of money secured by a bond, which bond is not in his possession, he may have judgment therefor, provided the circmstance be such, or be made such, that the defendant cannot be compelled to pay the same amount to a subsequent holder of the bond.

Now turn to this case: The plaintiff is entitled to a

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certain sum of money, being interest secured by a certain bond, which bond is held by another party; but that other party cannot recover the same sum from the defendant on the bond, provided the warrants held by the plaintiffs are cancelled in this suit; because, by the terms of the bond, the interest thereby secured is only to be paid *on presentation of the warrant*. This fully satisfies the demands of reason and of law, and entitles the plaintiff to judgment.

These bonds belong to a class of newly-invented securities, devised to meet the wants of society and promote great works of internal improvement. It is the duty of the Courts to enforce all contracts free from immorality and illegality, and shape remedies so as to execute the intention of the parties. When the first of this class of securities—the bonds issued by the King of Prussia—came into the English markets, they were challenged in the English courts as not negotiable. Prim old barristers, sticking in the bark of ancient technicalities, stood aghast at the idea that a bond — and instrument under seal — could be protected under the law merchant. But the courts held them negotiable; held that the law "*was made for man*," and that its remedies must keep pace with the changing phases of human affairs, the progress of modern civilization, and the revolutions of the world. The only ground upon which these bonds were held to be negotiable was *that the parties had intended them to be negotiable*. The court disregarded an ancient technicality to enforce the modern forms of contract. The dead past was left to bury its dead, but the court followed the progress of the age.

The same adaptation of remedies to the enforcement of the manifest intention of the parties, which held the bonds negotiable, would enable the holder of the interest warrants to recover on the bonds. In the usual course of business, these bonds and the collateral interest warrants are held by different parties.

This court, in Knox Co., *vs.* Aspinwall, 21 How. 546, say :

"A question was made upon the argument that the suit could not be maintained upon the coupons without the production of the bonds to which they had been attached But the answer is, that these coupons or warrants for the interest were drawn and executed in a form and mode for the very purpose of separating them from the bond, and thereby dispensing with the necessity of its production at the time of the accruing of each instalment of interest, and at the same time to furnish complete evidence of the payment of the interest to the makers of the obligation."

In that case the declaration counted on the coupon. But had the suit been brought like this, counting on the bond, the language employed as to the intention with which the bonds were executed would have been equally appropriate to the case.

Should the court hold that this plaintiff could not recover on the bonds the amount of the interest warrants without being the holder of the bonds themselves, yet the plaintiff could sell the warrants to the owner of the bonds, and he could maintain such suit. This shows that the objection is purely technical, and it can answer no beneficial purpose at all compensatory for the inconvenience and loss that would be inflicted upon the holders of this class of securities.

There are many instances in which a party is entitled to assert his rights under an instrument of which he is not, and another is, the legal holder. If a mortgage be given to secure several notes maturing at different times, the negotiation of the first note without assignment of the mortgage, entitles the assignee to enforce the mortgage security for his own benefit; and the supreme court of Wisconsin has decided, that in such case each subsequent holder is entitled to be paid in full to the exclusion of the notes subsequently maturing. (Marine Bank *vs.* Int. Bank, 9 Wis., 57; Wood *vs.* Mark, 7 Wis. 566.) This is because the parties are deemed to have so intended. Here the intention of the makers and holders of these bonds, and of all persons dealing in them, was to give right of action to different persons on the same bond; and the coupons entitle the holder to all the benefit he needs from the bond to enforce his right to recover the amount of the coupon which the bond provides shall be paid.

MATT H. CARPENTER.

Of Counsel for Defendant in Error.